

RECORD NO.

18-2814

In The
United States Court of Appeals
For The Second Circuit

**KATE DOYLE, NATIONAL SECURITY ARCHIVE,
CITIZENS FOR RESPONSIBILITY AND ETHICS IN
WASHINGTON, KNIGHT FIRST AMENDMENT
INSTITUTE AT COLUMBIA UNIVERSITY,**

Plaintiffs – Appellants,

v.

**UNITED STATES DEPARTMENT OF
HOMELAND SECURITY,**

Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

JOINT APPENDIX

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Counsel for Plaintiffs –Appellants

Counsel for Defendant – Appellee

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Attachment to Memorandum of Law
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Declaration of Anne L. Weismann,
With Exhibit,
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Exhibit:

A. Letter to
Anne L. Weismann from
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CLOSED,APPEAL,ECF

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:17-cv-02542-KPF

Doyle et al v. U.S. Department of Homeland Security

Assigned to: Judge Katherine Polk Failla

Cause: 05:552 Freedom of Information Act

Date Filed: 04/10/2017

Date Terminated: 09/21/2018

Jury Demand: None

Nature of Suit: 895 Freedom of Information Act

Jurisdiction: U.S. Government Defendant

Plaintiff

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Plaintiff

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V.

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ADR Provider

**Executive Office of the
President**

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Sarah Sheive Normand
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Date Filed	#	Docket Text
04/10/2017	1	COMPLAINT against U.S. Department of Homeland Security. (Filing Fee \$ 400.00, Receipt Number 0208-13522466) Document filed by Knight First Amendment Institute at Columbia University, Kate Doyle, Citizens for Responsibility and Ethics in Washington, National Security Archive.(Abdo, Alexander) (Entered: 04/10/2017)
04/10/2017	2	FILING ERROR - DEFICIENT CIVIL COVER SHEET - BLANK CIVIL COVER SHEET - CIVIL COVER SHEET filed. (Abdo, Alexander) Modified on 4/11/2017 (kl). (Entered: 04/10/2017)
04/10/2017	3	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Kate Doyle.(Abdo, Alexander) (Entered: 04/10/2017)
04/10/2017	4	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by National Security Archive. (Abdo, Alexander) (Entered: 04/10/2017)
04/10/2017	5	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Citizens for Responsibility and Ethics in Washington.(Abdo, Alexander) (Entered: 04/10/2017)
04/10/2017	6	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Knight First Amendment Institute at Columbia University.(Abdo, Alexander) (Entered: 04/10/2017)
04/10/2017	7	REQUEST FOR ISSUANCE OF SUMMONS as to U.S. Department of Homeland Security, re: 1 Complaint,. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security

		Archive. (Abdo, Alexander) (Entered: 04/10/2017)
04/10/2017	8	NOTICE OF CHANGE OF ADDRESS by Alexander Abraham Abdo on behalf of Knight First Amendment Institute at Columbia University. New Address: Knight First Amendment Institute at Columbia University, 535 West 116th Street, 314 Low Library, New York, New York, United States 10027, (212) 854-9600. (Abdo, Alexander) (Entered: 04/10/2017)
04/11/2017		<p>***NOTICE TO ATTORNEY REGARDING DEFICIENT CIVIL COVER SHEET. Notice to attorney Alexander Abraham Abdo to RE-FILE Document No. <u>2</u> Civil Cover Sheet. The filing is deficient for the following reason(s): CIVIL COVER SHEET IS BLANK. Re-file the document using the event type Civil Cover Sheet found under the event list Other Documents and attach the correct PDF. Use civil cover sheet issued by S.D.N.Y. dated July 2016. The S.D.N.Y. Civil Cover Sheet dated July 2016 is located at</p> <p><u>http://nysd.uscourts.gov/file/forms/civil-cover-sheet. (kl)</u> (Entered: 04/11/2017)</p>
04/11/2017		CASE OPENING INITIAL ASSIGNMENT NOTICE: The above-entitled action is assigned to Judge Katherine Polk Failla. Please download and review the Individual Practices of the assigned District Judge, located at <u>http://nysd.uscourts.gov/judges/District</u> . Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Please download and review the ECF Rules and Instructions, located at <u>http://nysd.uscourts.gov/ecf_filing.php</u> . (kl) (Entered: 04/11/2017)
04/11/2017		Magistrate Judge Andrew J. Peck is so designated. (kl) (Entered: 04/11/2017)
04/11/2017		Case Designated ECF. (kl) (Entered: 04/11/2017)
04/11/2017	9	ELECTRONIC SUMMONS ISSUED as to U.S. Department of Homeland Security. (kl) (Entered: 04/11/2017)
04/11/2017	10	CIVIL COVER SHEET filed. (Abdo, Alexander) (Entered: 04/11/2017)
04/17/2017	11	NOTICE OF INITIAL PRETRIAL CONFERENCE: Initial Conference set for 7/14/2017 at 04:00 PM in Courtroom 618, U.S. Courthouse, 40 Centre Street, New York, NY 10007 before Judge

		Katherine Polk Failla, and as further set forth in this Order. (Signed by Judge Katherine Polk Failla on 4/17/2017) (rjm) (Entered: 04/17/2017)
04/20/2017	12	AFFIDAVIT OF SERVICE of Summons and Complaint,. U.S. Department of Homeland Security served on 4/18/2017, answer due 5/9/2017. Service was made by Mail. Document filed by Knight First Amendment Institute at Columbia University; Kate Doyle; Citizens for Responsibility and Ethics in Washington; National Security Archive. (Attachments: # 1 Exhibit Certified Mail Receipts)(Abdo, Alexander) (Entered: 04/20/2017)
04/24/2017	13	FILING ERROR - DEFICIENT DOCKET ENTRY - MOTION for Anne L. Weismann to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-13577863. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive.(Weismann, Anne) Modified on 4/24/2017 (ma). (Entered: 04/24/2017)
04/24/2017		>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice to RE-FILE Document No. 13 MOTION for Anne L. Weismann to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number 0208-13577863. Motion and supporting papers to be reviewed by Clerk's Office staff... The filing is deficient for the following reason(s): MISSING AFFIDAVIT OR DECLARATION PURSUANT TO LOCAL RULE 1.3 AND CERTIFICATE OF GOOD STANDING FROM THE COURT OF APPEALS FOR DISTRICT OF COLUMBIA.; Re-file the motion as a Motion to Appear Pro Hac Vice - attach the correct signed PDF - select the correct named filer/filers - attach valid Certificates of Good Standing issued within the past 30 days - attach Proposed Order.. (ma) (Entered: 04/24/2017)
04/24/2017	14	FILING ERROR - DEFICIENT DOCKET ENTRY - MOTION for Anne L. Weismann to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at

		Columbia University, National Security Archive. (Attachments: # 1 Affidavit, # 2 Exhibit Certificate in Good Standing, # 3 Text of Proposed Order)(Weismann, Anne) Modified on 4/25/2017 (ma). (Entered: 04/24/2017)
04/25/2017		>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice to RE-FILE Document No. 14 MOTION for Anne L. Weismann to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff... The filing is deficient for the following reason(s): MISSING CERTIFICATE OF GOOD STANDING FROM THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.;. Re-file the motion as a Motion to Appear Pro Hac Vice - attach the correct signed PDF - select the correct named filer/filers - attach valid Certificates of Good Standing issued within the past 30 days - attach Proposed Order.. (ma) (Entered: 04/25/2017)
05/04/2017	15	AFFIDAVIT OF SERVICE of Notice of Initial Pretrial Conference and Court's Individual Rules served on U.S. Department of Homeland Security on 4/19/2017. Service was made by Mail. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive. (Attachments: # 1 Affidavit)(Abdo, Alexander) (Entered: 05/04/2017)
05/11/2017	16	NOTICE OF APPEARANCE by Elizabeth J Shapiro on behalf of U.S. Department of Homeland Security. (Shapiro, Elizabeth) (Entered: 05/11/2017)
05/11/2017	17	NOTICE OF APPEARANCE by Sarah Sheive Normand on behalf of U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 05/11/2017)
05/11/2017	18	NOTICE OF APPEARANCE by Brad P. Rosenberg on behalf of U.S. Department of Homeland Security. (Rosenberg, Brad) (Entered: 05/11/2017)
05/16/2017	19	MOTION for Anne L. Weismann to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at

		Columbia University, National Security Archive. (Attachments: # 1 Affidavit of Anne L. Weismann, # 2 Exhibit Certificate in Good Standing, # 3 Text of Proposed Order)(Weismann, Anne) (Entered: 05/16/2017)
05/16/2017		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 19 MOTION for Anne L. Weismann to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (bcu) (Entered: 05/16/2017)
05/17/2017	20	ORDER FOR ADMISSION PRO HAC VICE granting 19 Motion for Anne L. Weismann to Appear Pro Hac Vice. (Signed by Judge Katherine Polk Failla on 5/17/2017) (rjm) (Entered: 05/17/2017)
05/22/2017	21	ANSWER to 1 Complaint,. Document filed by U.S. Department of Homeland Security.(Normand, Sarah) (Entered: 05/22/2017)
07/06/2017	22	LETTER addressed to Judge Katherine Polk Failla from Sarah S. Normand dated 07/06/2017 re: Information Requested by Court in Advance of Initial Pretrial Conference. Document filed by U.S. Department of Homeland Security.(Normand, Sarah) (Entered: 07/06/2017)
07/14/2017	23	ORDER: On July 14, 2017, the Court held its Initial Pretrial Conference in this case. For the reasons discussed on the record, the Court hereby imposes the parties' proposed schedule for document production and motions practice: The Secret Service will complete its search for and processing of responsive "records of presidential visitors at Mar-a-Lago," and produce any non-exempt responsive records, by September 8, 2017; Defendant will file its motion for summary judgment by September 29, 2017; Plaintiffs will file their opposition (which may include an affidavit or declaration pursuant to Federal Rule of Civil Procedure 56(d)) and any cross-motion for summary judgment by November 13, 2017; Defendant will file its reply and opposition to any cross-motion by December 13, 2017; and Plaintiffs will file a reply in support of any cross-motion by January 12, 2018. (Cross Motions due by 11/13/2017., Motions due by 9/29/2017., Responses due by 12/13/2017, Replies due by 1/12/2018.) (Signed by Judge Katherine Polk Failla on 7/14/2017) (mro) (Entered: 07/17/2017)

07/14/2017		Minute Entry for proceedings held before Judge Katherine Polk Failla: Initial Pretrial Conference held on 7/14/2017. (Court Reporter Rose Prater) (Lopez, Jose) (Entered: 07/17/2017)
08/16/2017	24	TRANSCRIPT of Proceedings re: CONFERENCE held on 7/14/2017 before Judge Katherine Polk Failla. Court Reporter/Transcriber: Rose Prater, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/6/2017. Redacted Transcript Deadline set for 9/18/2017. Release of Transcript Restriction set for 11/14/2017.(McGuirk, Kelly) (Entered: 08/16/2017)
08/16/2017	25	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a CONFERENCE proceeding held on 7/14/17 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...(McGuirk, Kelly) (Entered: 08/16/2017)
08/30/2017	26	FILING ERROR - DEFICIENT DOCKET ENTRY - FIRST MOTION to Amend/Correct 1 Complaint, . Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive. (Attachments: # 1 Memorandum in Support, # 2 Exhibit A, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E, # 7 Exhibit F)(Weismann, Anne) Modified on 11/8/2017 (ldi). (Entered: 08/30/2017)
09/07/2017	27	LETTER MOTION for Extension of Time <i>to Produce Records to Plaintiffs</i> addressed to Judge Katherine Polk Failla from Sarah S. Normand dated 09/07/2017. Document filed by U.S. Department of Homeland Security.(Normand, Sarah) (Entered: 09/07/2017)
09/08/2017	28	MEMO ENDORSED granting 27 Letter Motion for Extension of Time. ENDORSEMENT: Application GRANTED. Defendant's deadline to produce agency records responsive to Plaintiff's FOIA request is hereby extended from September 8, 2017, to September 15,

		2017, at 12:00 p.m.. (Signed by Judge Katherine Polk Failla on 9/8/2017) (js) (Entered: 09/08/2017)
09/13/2017	29	RESPONSE to Motion re: 26 FIRST MOTION to Amend/Correct 1 Complaint, . <i>and joint request for amended briefing schedule.</i> Document filed by U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 09/13/2017)
09/14/2017	30	MEMO ENDORSED granting 26 Motion to Amend/Correct 26 FIRST MOTION to Amend/Correct 1 Complaint, . ENDORSEMENT: Application Granted. So Ordered. (Signed by Judge Katherine Polk Failla on 9/14/2017) (js) (Entered: 09/14/2017)
09/14/2017		Set/Reset Deadlines: Cross Motions due by 12/4/2017. Motions due by 10/23/2017. Responses due by 1/12/2018 Replies due by 2/2/2018. (js) (Entered: 09/14/2017)
09/14/2017	31	FILING ERROR - DEFICIENT PLEADING - FILED AGAINST PARTY ERROR - FIRST AMENDED COMPLAINT amending 1 Complaint, against U.S. Department of Homeland Security.Document filed by Knight First Amendment Institute at Columbia University, Kate Doyle, Citizens for Responsibility and Ethics in Washington, National Security Archive. Related document: 1 Complaint,. (Weismann, Anne) Modified on 9/15/2017 (pc). (Entered: 09/14/2017)
09/15/2017		***NOTICE TO ATTORNEY REGARDING DEFICIENT PLEADING. Notice to Attorney Anne L Weismann to RE-FILE re: Document No. 31 Amended Complaint. The filing is deficient for the following reason(s): all of the parties listed on the pleading were not entered on CM ECF; the wrong party/parties whom the pleading is against were selected. Docket the event type Add Party to Pleading found under the event list Complaints and Other Initiating Documents.. Re-file the pleading using the event type Amended Complaint found under the event list Complaints and Other Initiating Documents - attach the correct signed PDF - select the individually named filer/filers - select the individually named party/parties the pleading is against. (pc) (Entered: 09/15/2017)
09/15/2017	32	FIRST AMENDED COMPLAINT amending 1 Complaint, 31 Amended Complaint, against U.S. Department of Homeland Security,

		Executive Office of the President.Document filed by Knight First Amendment Institute at Columbia University, Kate Doyle, Citizens for Responsibility and Ethics in Washington, National Security Archive. Related document: 1 Complaint, 31 Amended Complaint., (Weismann, Anne) (Entered: 09/15/2017)
09/20/2017	33	FILING ERROR - DEFICIENT DOCKET ENTRY - MOTION for Order to Show Cause <i>for Failing to Comply With the Court's July 14 Order</i> . Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive. (Attachments: # 1 Memorandum of Law in Support, # 2 Affidavit of Anne L. Weismann, # 3 Exhibit A, # 4 Exhibit B, # 5 Exhibit C, # 6 Exhibit D, # 7 Exhibit E, # 8 Exhibit F)(Weismann, Anne) Modified on 11/21/2017 (ldi). (Entered: 09/20/2017)
09/20/2017	34	LETTER MOTION for Oral Argument addressed to Judge Katherine Polk Failla from Anne L. Weismann dated September 20, 2017. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive.(Weismann, Anne) (Entered: 09/20/2017)
09/20/2017	35	RESPONSE to Motion re: 33 MOTION for Order to Show Cause <i>for Failing to Comply With the Court's July 14 Order</i> . . Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 09/20/2017)
09/20/2017	36	MEMO ENDORSED on re: 35 Response to Motion, filed by U.S. Department of Homeland Security, Executive Office of the President. ENDORSEMENT: Application GRANTED. The deadline for Defendants' response to Plaintiff's motion for an order to show cause is October 4, 2017. (Signed by Judge Katherine Polk Failla on 9/20/2017) (js) (Entered: 09/21/2017)
09/20/2017		Set/Reset Deadlines as to 33 MOTION for Order to Show Cause <i>for Failing to Comply With the Court's July 14 Order</i> .. Responses due by 10/4/2017 (js) (Entered: 09/21/2017)
09/21/2017	37	MEMO ENDORSED terminating 34 Letter Motion for Oral Argument. ENDORSEMENT: The Court is in receipt of Plaintiffs' request for oral argument ontheir motion for an order to show cause

		and shall schedule oral argument if, after receiving Defendants' response, the Court believes oral argument would be of use. (Signed by Judge Katherine Polk Failla on 9/21/2017) (js) (Entered: 09/21/2017)
09/29/2017	38	NOTICE OF APPEARANCE by Casey Kyung-Se Lee on behalf of Executive Office of the President, U.S. Department of Homeland Security. (Lee, Casey) (Entered: 09/29/2017)
10/04/2017	39	MEMORANDUM OF LAW in Opposition re: 33 MOTION for Order to Show Cause <i>for Failing to Comply With the Court's July 14 Order.</i> . Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 10/04/2017)
10/04/2017	40	DECLARATION of Kim E. Campbell in Opposition re: 33 MOTION for Order to Show Cause <i>for Failing to Comply With the Court's July 14 Order.</i> . Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 10/04/2017)
10/11/2017	41	REPLY MEMORANDUM OF LAW in Support re: 33 MOTION for Order to Show Cause <i>for Failing to Comply With the Court's July 14 Order.</i> . Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive. (Attachments: # 1 Affidavit, # 2 Exhibit A, # 3 Exhibit B)(Weismann, Anne) (Entered: 10/11/2017)
10/11/2017	42	ORDER denying 33 Motion for Order to Show Cause. Consequently, Plaintiffs' motion for the same is DENIED. The parties shall continue to abide by the schedule provided in the July 14 Order. SO ORDERED. (Signed by Judge Katherine Polk Failla on 10/11/2017) (anc) (Entered: 10/11/2017)
10/19/2017	43	LETTER MOTION for Leave to File Excess Pages addressed to Judge Katherine Polk Failla from Sarah S. Normand dated October 19, 2017. Document filed by Executive Office of the President, U.S. Department of Homeland Security.(Normand, Sarah) (Entered: 10/19/2017)
10/20/2017	44	ORDER granting 43 Letter Motion for Leave to File Excess Pages. Application GRANTED in part. The parties' opening memoranda of

		law shall be no more than 35 pages. Reply memoranda, if any, shall be no more than 15 pages. (Signed by Judge Katherine Polk Failla on 10/20/2017) (mml) (Entered: 10/20/2017)
10/23/2017	45	MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims.</i> , MOTION to Dismiss <i>Plaintiffs' Remaining Claims.</i> (Responses due by 12/4/2017) Document filed by Executive Office of the President, U.S. Department of Homeland Security.(Normand, Sarah) (Entered: 10/23/2017)
10/23/2017	46	DECLARATION of Kim E. Campbell in Support re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims.</i> MOTION to Dismiss <i>Plaintiffs' Remaining Claims..</i> Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Attachments: # 1 Exhibit A)(Normand, Sarah) (Entered: 10/23/2017)
10/23/2017	47	DECLARATION of James M. Murray in Support re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims.</i> MOTION to Dismiss <i>Plaintiffs' Remaining Claims..</i> Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Attachments: # 1 Exhibit 1)(Normand, Sarah) (Entered: 10/23/2017)
10/23/2017	48	DECLARATION of William Willson in Support re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims.</i> MOTION to Dismiss <i>Plaintiffs' Remaining Claims..</i> Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 10/23/2017)
10/23/2017	49	DECLARATION of Philip C. Droege in Support re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims.</i> MOTION to Dismiss <i>Plaintiffs' Remaining Claims..</i> Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 10/23/2017)
10/23/2017	50	DECLARATION of Charles Christopher Herndon in Support re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims.</i> MOTION to Dismiss <i>Plaintiffs' Remaining Claims..</i> Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Normand, Sarah) (Entered: 10/23/2017)
10/23/2017	51	MEMORANDUM OF LAW in Support re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims.</i> MOTION to Dismiss

		<i>Plaintiffs' Remaining Claims.</i> . Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 10/23/2017)
12/04/2017	52	MEMORANDUM OF LAW in Opposition re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims</i> . MOTION to Dismiss <i>Plaintiffs' Remaining Claims</i> . . Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive. (Attachments: # 1 Affidavit, # 2 Exhibit A, # 3 Exhibit B)(Weismann, Anne) (Entered: 12/04/2017)
12/04/2017	53	LETTER MOTION for Oral Argument addressed to Judge Katherine Polk Failla from Anne L. Weismann dated December 4, 2017. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive.(Weismann, Anne) (Entered: 12/04/2017)
12/04/2017	54	MEMO ENDORSED terminating 53 Letter Motion for Oral Argument. ENDORSEMENT: The Court is in receipt of Plaintiffs' request for oral argument and shall order such argument when and if the Court would find it useful. (Signed by Judge Katherine Polk Failla on 12/4/2017) (js) (Entered: 12/05/2017)
01/12/2018	55	REPLY MEMORANDUM OF LAW in Support re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims</i> . MOTION to Dismiss <i>Plaintiffs' Remaining Claims</i> . . Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 01/12/2018)
01/18/2018	56	LETTER addressed to Judge Katherine Polk Failla from AUSA Sarah Norman dated January 18, 2018 re: Courtesy copies of the motion papers. Document filed by Executive Office of the President, U.S. Department of Homeland Security.(Normand, Sarah) (Entered: 01/18/2018)
01/30/2018	57	NOTICE OF CHANGE OF ADDRESS by Alexander Abraham Abdo on behalf of Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive. New Address: Knight First Amendment Institute at Columbia University, 475

		Riverside Drive, Suite 302, New York, NY, United States 10115, (646) 745-8500. (Abdo, Alexander) (Entered: 01/30/2018)
02/20/2018	58	LETTER addressed to Judge Katherine Polk Failla from Anne L. Weismann dated February 20, 2018 re: Recent settlement in Public Citizen v. Secret Service (D.D.C.). Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive.(Weismann, Anne) (Entered: 02/20/2018)
02/27/2018	59	LETTER addressed to Judge Katherine Polk Failla from AUSA Sarah S. Normand dated February 27, 2018 re: Recent Settlement in Public Citizen v. Secret Service (D.D.C.). Document filed by Executive Office of the President, U.S. Department of Homeland Security. (Normand, Sarah) (Entered: 02/27/2018)
03/02/2018	60	LETTER addressed to Judge Katherine Polk Failla from Anne L. Weismann dated March 2, 2018 re: Defs.' Letter of Feb. 27, 2018. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Knight First Amendment Institute at Columbia University, National Security Archive.(Weismann, Anne) (Entered: 03/02/2018)
07/26/2018	61	OPINION AND ORDER re: 45 MOTION for Summary Judgment on <i>Plaintiffs' FOIA Claims</i> . MOTION to Dismiss <i>Plaintiffs' Remaining Claims</i> . filed by U.S. Department of Homeland Security, Executive Office of the President. Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART, and Defendants' motion to dismiss is GRANTED. Within 60 days of the date of this Opinion and Order, Defendants are directed to disclose any materials responsive to Plaintiffs' FOIA surviving FOIA claims, and the parties are to provide a joint letter to the Court as to how they wish to proceed. SO ORDERED. (Signed by Judge Katherine Polk Failla on 7/26/18) (yv) (Entered: 07/26/2018)
09/21/2018	62	CONSENT LETTER addressed to Judge Katherine Polk Failla from Anne L. Weismann dated September 21, 2018 re: Response to July 26, 2018 Court Order. Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Executive Office of the President, Knight First Amendment Institute at Columbia University, National Security Archive.(Weismann, Anne) (Entered: 09/21/2018)

09/21/2018	63	CIVIL JUDGMENT: Accordingly, the parties requested that this Court enter a final judgment in this matter. The Court hereby enters judgment. The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case. SO ORDERED. (Signed by Judge Katherine Polk Failla on 9/21/2018) (anc) (Entered: 09/21/2018)
09/21/2018		Terminate Transcript Deadlines re: 24 . (anc) (Entered: 09/21/2018)
09/24/2018	64	NOTICE OF APPEAL from 63 Judgment, 61 Memorandum & Opinion,, Document filed by Citizens for Responsibility and Ethics in Washington, Kate Doyle, Executive Office of the President, Knight First Amendment Institute at Columbia University, National Security Archive. Filing fee \$ 505.00, receipt number 0208-15608057. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Weismann, Anne) (Entered: 09/24/2018)
09/24/2018		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 64 Notice of Appeal,. (nd) (Entered: 09/24/2018)
09/24/2018		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 64 Notice of Appeal, filed by National Security Archive, Kate Doyle, Executive Office of the President, Citizens for Responsibility and Ethics in Washington, Knight First Amendment Institute at Columbia University were transmitted to the U.S. Court of Appeals. (nd) (Entered: 09/24/2018)

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE,)
NATIONAL SECURITY ARCHIVE,)
CITIZENS FOR RESPONSIBILITY)
AND ETHICS IN WASHINGTON,)
THE KNIGHT FIRST AMENDMENT)
INSTITUTE AT COLUMBIA)
UNIVERSITY,)
Plaintiffs,) Civil Action No. 17-2542 (KPF)
v.)
U.S. DEPARTMENT OF HOMELAND)
SECURITY,)
EXECUTIVE OFFICE OF THE)
PRESIDENT,)
Defendants.)

AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, the Federal Records Act (“FRA”), 44 U.S.C. §§ 2101, *et seq.*, 3010 *et seq.*, and 3301, *et seq.*, and the Presidential Record Act (“PRA”), 44 U.S.C. §§ 2201, *et seq.*, for injunctive, declaratory, and other appropriate relief. Plaintiffs challenge the failure of the U.S. Department of Homeland Security (“DHS”) to disclose to them records of visits to the White House and to President Donald Trump at his Mar-a-Lago and Trump Tower residences that the Secret Service, a component of

DHS, maintains. Plaintiffs also challenge as arbitrary, capricious, and contrary to law the treatment by the Executive Office of the President (“EOP”) and DHS of records of visits to agency components of the EOP as presidential records under the PRA that are not publicly accessible through the FOIA, and the failure of DHS to manage and preserve these records under the FRA.

2. This case seeks declaratory relief that DHS is in violation of the FOIA, 5 U.S.C. § 552(a)(3)(a), by refusing to search for and provide plaintiffs with all responsive documents on an expedited basis, injunctive relief ordering the defendant DHS to process and release to plaintiffs immediately the requested records, declaratory relief that the policies and practices of the EOP and DHS to treat records of visits to agency components of the EOP as presidential records violate both the FRA and the PRA, and injunctive relief ordering DHS to manage and maintain these records as agency records pursuant to the FRA.

Jurisdiction and Venue

3. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 702, and 28 U.S.C. §§ 133, 2201(a), and 2202. Venue lies in this district under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

Parties

4. Plaintiff Kate Doyle is a senior analyst of U.S. policy in Latin America. Based in the New York office of the National Security Archive, Ms. Doyle works with other scholars, journalists, human rights groups, truth commissions, prosecutors, and judges to open and analyze government files, including through use of the FOIA. Ms. Doyle has

authored several dozen book chapters and articles that have appeared in scholarly publications such as the *World Policy Journal*, and in media ranging from *Harper's Magazine* to Mexico's *Proceso*.

5. Plaintiff National Security Archive is an independent, non-governmental, non-profit research institute organized under section 501(c)(3) of the Internal Revenue Code. The Archive collects, analyzes, and publishes U.S. government documents acquired through the FOIA in order to enrich scholarship and journalism with primary sources, and to promote openness and government accountability. The Archive won the 1999 George Polk Award, one of U.S. journalism's most prestigious prizes, for – in the words of the citation – “piercing self-serving veils of government secrecy, guiding journalists in search for the truth, and informing us all.” The Archive is a representative of the news media as defined in 5 U.S.C. § 552(a)(4)(a)(ii). Prior Archive litigation under the FOIA and the Federal Records Act compelled the preservation and e-archiving of White House e-mail from every Presidential administration from Reagan to Obama.

6. Plaintiff CREW is a non-profit, non-partisan organization organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the rights of citizens to be informed about the activities of government officials and agencies, and to ensuring the integrity of government officials and agencies. CREW seeks to empower citizens to have an influential voice in government decisions and in the government decision-making process through the dissemination of information about public officials and their actions. To advance its mission, CREW uses a combination of research, litigation, and advocacy. As part of its research, CREW uses government records made available to it under the FOIA. CREW has sought records of White House

visits from the Secret Service in the past, and its prior litigation led to the decision of the Obama administration to establish a system for publishing White House visitor logs on an ongoing basis.

7. Plaintiff Knight First Amendment Institute at Columbia University is a newly established New York not-for-profit corporation that works to preserve and expand the freedoms of speech and the press through strategic litigation, research, and public education. Research and public education are essential to the Institute's mission. Obtaining information about government activity through the FOIA, analyzing that information, and publishing and disseminating its analysis to the press and public are among the core activities the Institute was established to perform.

8. Defendant DHS is an agency within the meaning of 5 U.S.C. § 552(f) and 5 U.S.C. § 701. DHS and its component Secret Service have possession and control of the requested records and are responsible for fulfilling plaintiffs' FOIA requests.

9. Defendant EOP includes the agency known as the EOP and its individual components. The agency components of the EOP subject to the FOIA and the FRA include the Council on Environmental Quality ("CEQ"), the Office of Management and Budget ("OMB"), the Office of National Drug Control Policy ("ONDCP"), the Office of Science and Technology Policy ("OSTP"), and the Office of the United States Trade Representative ("USTR").

STATUTORY BACKGROUND

The FOIA

10. The FOIA, 5 U.S.C. § 552, requires agencies of the federal government to release requested records to the public unless one or more specific statutory exemptions apply.

11. An agency must respond to a party making a FOIA request within 20 working days, notifying that party which records it will produce, which records it is withholding and why, and the requester's right to appeal the agency's determination administratively, and thereafter must make the documents "promptly available." 5 U.S.C. § 552(a)(6)(A)(i),

12. In "unusual" circumstances" an agency may delay its response to a FOIA request or appeal, but must provide notice and "the date on which a determination is expected to be dispatched." 5 U.S.C. § 552(a)(6)(B).

13. If the agency fails to comply with these time limits, a requester is deemed to have exhausted administrative remedies. 5 U.S.C. § 552(a)(6)(C)(i).

The FRA

14. The FRA is a collection of statutes that govern the creation, management, and disposal of federal or "agency" records. 44 U.S.C. U.S.C. §§ 2101-18, 2901-09, 3101-07, and 3301-24. The FRA requires that federal agencies establish: (1) a program to make and preserve agency records; (2) effective controls over the creation, maintenance, and use of records; and (3) safeguards against the removal or loss of records. 44 U.S.C. §§ 3101, 3102, and 3105.

15. Federal or "agency" records are defined to include "all books, papers . . . or other documentary materials, regardless of physical form or characteristics . . . made or received by an agency of the United States Government under Federal law in connection

with the transaction of public business and preserved or appropriate for preservation by that agency . . . as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the information value of data in them.” 44 U.S.C. § 3301.

16. Specific provisions of the FRA, 44 U.S.C. §§ 3301, *et seq.*, govern the disposal of federal records and provide the exclusive procedure by which all federal records may be disposed or destroyed, and then only with the authorization of the Archivist of the United States. 44 U.S.C. § 3314.

17. The FRA imposes on heads of agencies an affirmative duty to implement standards and guidelines for the retention of federal records. Each agency head must maintain an active records management program that provides for effective controls over the creation and use of federal records and that ensures the application of the Archivist’s standards and procedures for the preservation of federal records. 44 U.S.C. § 3102.

18. A member of the public may request the disclosure of agency records subject to the FRA through the FOIA, 5 U.S.C. § 552(f).

19. An individual record that meets the definition of an agency record and is therefore within the scope of the FOIA cannot also qualify as a presidential record. This is because “the definition of ‘agency’ records in the FOIA trumps the definition of ‘presidential records’ in the PRA.” *Armstrong v. EOP*, 1 F.3d 1274, 1293 (D.C. Cir. 1993).

The PRA

20. The PRA, enacted in 1978 to establish public ownership of presidential and vice presidential records, imposes recordkeeping requirements on the President and Vice

President. Specifically, the PRA directs the President to “take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records[.]” 44 U.S.C. § 2203.

21. The PRA mandates that records created or received in the White House “the function of which is to advise or assist the President, shall, to the extent practicable, be categorized as Presidential records or personal records upon their creation or receipt and be filed separately.” 44 U.S.C. § 2203(b).

22. Because the FOIA’s definition of agency record trumps the PRA’s definition of presidential record, once a record is determined to be an agency record under the FOIA it cannot be treated as a presidential record. This is “absolutely essential to preventing the PRA from becoming a potential presidential *carte blanche* to shield materials from the reach of the FOIA.” *Armstrong v. EOP*, 1 F.3d at 1292.

Factual Background

23. In September 2009, then-President Obama announced that starting in a few months, he would open up to the public White House visitor logs on a regular basis by posting online every month the names of visitors over the previous 90 to 120 days.

24. Under the new policy, the posted records would include names of visitors, the dates and times they entered and left the White House compound, and the names of the persons they visited. The logs were subject to several exceptions, including purely personal guests of the Obama family, the need to protect national security interests, and

the temporary need to protect particularly sensitive meetings, such as the vetting of a Supreme Court candidate.

25. In explaining the policy, President Obama said in a written statement, “Americans have a right to know whose voices are being heard in the policymaking process.” When he left office, President Obama’s administration had released under this policy 5.99 million records of White House visitors.

26. President Obama’s decision to provide public access to White House visitor logs was the result of four separate lawsuits brought by CREW under the FOIA.

27. When President Trump took office, the White House refused to say whether it would continue to provide public access to White House visitor logs. In response to this silence, on March 6, 2017, eight Senators wrote to President Trump and U.S. Secret Service Deputy Director William J. Callahan seeking the ongoing release of White House visitor logs.

28. In their letter to the President, the senators noted that during President Obama’s tenure, “[t]hese logs provided the American public an unprecedented look at who was lobbying his Administration without compromising the President’s ability to execute the functions of his office on a day-to-day basis.” The letter also mentioned concerns about transparency at President Trump’s so-called “Winter White House,” Mar-a-Lago, and urged President Trump to extend President Obama’s policies on visitor logs “to address your decision to regularly conduct official business at private properties that also provide access to certain members of the public.”

29. The senators’ letter to Mr. Callahan echoed these concerns. Specifically, they noted,

It would be a significant setback to efforts to give the public insight into who influences the White House if this policy were to be discontinued or limited. Indeed, given the unique aspects of how President Trump has decided to conduct official business, we believe he needs to do even more just to meet the benchmark of transparency set by President Obama. President Trump has already taken four trips to his so-called ‘Winter White House’ at his Mar-a-Lago estate in Florida, during which he conducted official business in full view of Mar-a-Lago members and their guests. During his transition, then President-elect Trump worked at the Trump Tower and the Trump National Golf Club in Bedminster, New Jersey, two locations that are also open to certain members of the public. Recently released audio of one post-election visit to Bedminster captured then President-elect Trump inviting members to ‘come around’ as he interviews people to serve in his administration.

30. Both letters sought responses to specific questions. Among the information sought from the Secret Service was whether the records systems used to track visitors at the White House complex – the Workers and Visitors Entry System (“WAVES”) and the Access Control Records system (“ACR”) – also were being used at Mar-a-Lago, and whether their use was being considered for Trump Tower, Bedminster, and other Trump properties where the President may conduct official business. This same question also was posed to President Trump.

31. On information and belief, neither President Trump nor Deputy Director Callahan responded to these letters.

32. Instead, on April 14, 2017, President Trump through a spokesperson announced the White House would no longer provide public access to White House visitor logs.

33. Plaintiffs filed their first complaint in this case on April 10, 2017, against DHS. Plaintiffs’ complaint challenges the failure of DHS to comply with its obligations under the FOIA with respect to two requests.

34. First, on January 23, 2017, Plaintiff Kate Doyle sent a FOIA request by facsimile to the Secret Service requesting all WAVES and ACR records for three days: January 20, January 21, and January 22, 2017. From these records, Ms. Doyle requested 28 fields of data that were displayed in a screenshot of the White House Visitor Records Requests website of President Obama, which she included with her request.

35. On February 24, 2017, Ms. Doyle sent by facsimile an administrative appeal based on the refusal of the Secret Service to respond in any way to her request.

36. At the time plaintiffs filed their complaint, the Secret Service had not responded to either Ms. Doyle's request of January 23 or her appeal of February 24, 2017.

37. At the time plaintiffs filed their complaint, the Secret Service had not provided Ms. Doyle with a determination on her request, including an identification of what documents the agency plans to release, what documents the agency plans to withhold, and why. The FOIA requires agencies to make this determination within 20 business days of receiving a non-expedited FOIA request.

38. Because the Secret Service failed to make a determination under the FOIA on Ms. Doyle's request, she had exhausted all applicable administrative remedies at the time plaintiffs filed their complaint.

39. Second, on March 10, 2017, Plaintiffs Doyle, the National Security Archive, CREW, and the Knight First Amendment Institute sent by facsimile a second FOIA request to the Secret Service. This request seeks two categories of records: (1) all WAVES and ACR records from January 20, 2017 until March 8, 2017, and (2)

records of presidential visitors at Mar-a-Lago and Trump Tower from January 20, 2017 to March 8, 2017. From these records the request identifies the same 28 fields of data contained in the White House Visitor Records posted by the Obama administration.

40. Plaintiffs also requested that the Secret Service expedite this second request in light of the significant concerns raised about how President Trump is using his private properties at Mar-a-Lago and Trump Tower, the extensive media coverage of this issue, and the refusal of the President to date to commit to releasing the visitor logs data.

41. At the time plaintiffs filed their complaint, the Secret Service had not responded in any way to the March 10, 2017 expedited FOIA request.

42. This failure to respond includes a failure to make a determination under the FOIA within 10 calendar days on plaintiffs' request for expedition, as the FOIA and DHS regulations require,

43. Further, the Secret Service failed to process the March 10, 2017 request as soon as practicable and provide plaintiffs with a determination on their request, including an identification of what documents the agency plans to release, what documents the agency plans to withhold, and why, as the FOIA requires for expedited requests.

44. The Secret Service also failed to make a determination under the FOIA on plaintiffs' request within 20 business days, as the FOIA requires for non-expedited requests.

45. Because the Secret Service failed to make a determination under the FOIA on plaintiffs' second FOIA request under either the standards set out for expedited requests

or those set out for all other requests, plaintiffs had exhausted all applicable administrative remedies when they filed their complaint.

46. DHS filed its answer to the complaint on May 22, 2017 (Dkt. 21).

47. On July 14, 2017, following the Initial Pretrial Conference, the Court entered an order adopting the parties' proposed schedule for document production and motions (Dkt. 23). Under that schedule, the Secret Service is to produce all non-exempt responsive records of presidential visitors at Mar-a-Lago by September 8, 2017, and the parties' briefing on the remaining issues is to be completed by January 12, 2018.

48. On August 17, 2017, Public Citizen, Inc. filed a complaint against the United States Secret Service, Civil Action No. 17-1669 (D.D.C.), challenging the failure of the Secret Service under the FOIA to produce records of visits to four EOP agencies subject to the FOIA: OMB, OSTP, ONDCP, and CEQ. Public Citizen identified its case as related to this lawsuit because they share common issues of fact.

49. With its complaint, Public Citizen also filed a motion for a temporary restraining order and preliminary injunction to require the Secret Service to maintain copies of the records at issue in that case pending resolution of the litigation. Public Citizen's motion is based on the administrative response of the Secret Service to its FOIA requests that the requested records are presidential and governed by the PRA, not agency records subject to the FOIA, and that in any event the Secret Service has not maintained the requested records, but instead has transferred them – and continues to transfer them – to the White House Office of Records Management, a non-agency component of the EOP.

50. In its opposition to the motion for a temporary restraining order the Secret Service relied in part on a 2015 Memorandum of Understanding (“MOU”) that, on information and belief, has never before been made public. That MOU states in relevant part: “[a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component.” The Secret Service has interpreted this provision as applying to all the records at issue in the *Public Citizen* lawsuit.

PLAINTIFFS’ CLAIMS FOR RELIEF

CLAIM ONE

(DHS’s Wrongful Withholding of Non-Exempt Records Requested by Plaintiff Doyle)

51. Plaintiffs repeat and re-allege paragraphs 1-50.
52. Plaintiff Doyle properly asked for records within the custody and control of the Secret Service, a component of DHS.
53. Defendant DHS wrongfully withheld agency records requested by Plaintiff Doyle by failing to comply with the statutory time limit for making a determination on non-expedited FOIA requests, and by withholding from disclosure records responsive to her FOIA request.
54. By failing to release the records as Plaintiff Doyle specifically requested, defendant DHS violated the FOIA.
55. Plaintiff Doyle therefore is entitled to injunctive and declaratory relief with respect to the prompt processing and disclosure of the requested records.

CLAIM TWO
(DHS's Wrongful Withholding of Non-Exempt Records Requested by Plaintiffs)

56. Plaintiffs repeat and re-allege paragraphs 1-55.
57. Plaintiffs properly asked for records within the custody and control of the Secret Service, a component of DHS, on an expedited basis.
58. Defendant DHS wrongfully withheld agency records requested by plaintiffs by failing to act "as soon as practicable" to make a determination on the plaintiffs' expedited FOIA request, and by withholding from disclosure records responsive to their FOIA request.
59. By failing to release the records as plaintiffs specifically requested, defendant DHS violated the FOIA.

60. Plaintiffs therefore are entitled to injunctive and declaratory relief with respect to the expedited processing and disclosure of the requested records.

CLAIM THREE
(EOP's Wrongful Treatment of Agency Records as Presidential Records Not Accessible Through the FOIA)

61. Plaintiffs repeat and re-allege paragraphs 1-60.
62. Records the Secret Service creates and maintains of visits to agency components of the EOP are agency records under the FRA and subject to disclosure under the FOIA.
63. By entering into an MOU that declares that the records of visits to agency components of the EOP are under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component, the EOP violated its mandatory, non-discretionary obligation under the FRA and the PRA to treat these records as agency records of DHS subject to the FOIA.

64. Plaintiffs are therefore entitled to injunctive and declaratory relief with respect to the EOP's treatment of these records as agency records subject to the FOIA.

CLAIM FOUR
(DHS's Wrongful Treatment of Agency Records as Presidential Records Not Accessible Through the FOIA)

65. Plaintiffs repeat and re-allege paragraphs 1-64.

66. Records the Secret Service creates and maintains of visits to agency components of the EOP are agency records under the FRA and subject to disclosure under the FOIA.

67. By entering into an MOU that declares that the records of visits to agency components of the EOP are under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component, DHS violated its mandatory, non-discretionary obligation under the FRA to treat and manage these records as agency records of DHS subject to the FOIA.

68. Plaintiffs are therefore entitled to injunctive and declaratory relief with respect to DHS's treatment of these records as agency records subject to the FOIA.

Requested Relief

WHEREFORE, plaintiffs respectfully request that this Court:

(1) Order defendant DHS to fully and promptly process Plaintiff Doyle's January 23, 2017 FOIA request and disclose all non-exempt documents immediately to plaintiff;

(2) Issue a declaration that Plaintiff Doyle is entitled to prompt processing and disclosure of the requested records;

(3) Order defendant DHS to fully and immediately process plaintiffs' March 10, 2017 FOIA request and disclose all non-exempt documents immediately to the plaintiffs;

(4) Issue a declaration that plaintiffs are entitled to expedited processing and disclosure of the requested records;

(5) Order defendant EOP to treat all records the Secret Service creates and maintains of visits to agency components of the EOP as agency records of DHS;

(6) Issue a declaration that all records the Secret Service creates and maintains of visits to agency components of the EOP are agency records of DHS and any MOU to the contrary is unlawful and unenforceable;

(7) Order DHS to treat and manage all records the Secret Service creates and maintains of visits to agency components of the EOP as agency records of DHS subject to the FOIA;

(8) Provide for expeditious proceedings in this action;

(9) Retain jurisdiction of this action to ensure no agency records are wrongfully withheld;

(10) Award plaintiffs their costs and reasonable attorneys' fees in this action; and

(11) Grant such other relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Anne L. Weismann
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Dated: September 15, 2017,

Attorneys for Plaintiffs

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

.....x
KATE DOYLE, NATIONAL SECURITY
ARCHIVE, CITIZENS FOR RESPONSIBILITY
AND ETHICS IN WASHINGTON, KNIGHT
FIRST AMENDMENT INSTITUTE AT
COLUMBIA UNIVERSITY,

Plaintiffs,

17 Civ. 2542 (KPF)

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY, EXECUTIVE OFFICE OF THE
PRESIDENT,

Defendants.

.....x
NOTICE OF MOTION

PLEASE TAKE NOTICE THAT, upon the Declarations of Kimberly E. Campbell, James M. Murray, William Willson, Philip C. Droege, and Charles Christopher Herndon, the exhibits annexed thereto, and the accompanying memorandum of law, defendants the Department of Homeland Security (“DHS”) and the Executive Office of the President, by their attorneys, Joon H. Kim, Acting United States Attorney for the Southern District of New York, and Chad A. Readler, Acting Assistant Attorney General, will move this Court before the Honorable Katherine Polk Failla, United States District Judge, at the United States Courthouse, 40 Foley Square, New York, New York 10007, for an order granting summary judgment to defendant DHS with regard to plaintiffs’ FOIA claims pursuant to Federal Rule of Civil Procedure 56, and dismissing plaintiffs’ remaining claims for lack of subject matter jurisdiction

pursuant to Federal Rule of Civil Procedure 12(b)(1) and/or failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

Dated: New York, New York

October 23, 2017

CHAD A. READLER
Acting Assistant Attorney General

JOON H. KIM
Acting United States Attorney for the
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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE, et al,

Plaintiffs,

No. 17 Civ. 2542 (KPF)

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,
EXECUTIVE OFFICE OF THE PRESIDENT,

Defendants.

SECOND DECLARATION OF KIM E. CAMPBELL,
SPECIAL AGENT IN CHARGE, LIAISON DIVISION, AND
FREEDOM OF INFORMATION AND PRIVACY ACTS OFFICER,
UNITED STATES SECRET SERVICE

I, Kim E. Campbell, make the following declaration in lieu of affidavit pursuant to 28 U.S.C. § 1746:

1. I am the Special Agent in Charge of the Liaison Division, Office of Government and Public Affairs, and the Freedom of Information and Privacy Acts (FOI/PA) Officer for the United States Secret Service (“Secret Service”), Department of Homeland Security (“DHS”). In this position, I oversee the Freedom of Information and Privacy Acts Office. I have been assigned as the Secret Service FOI/PA Officer since July 2014 and have been employed with the Secret Service since July 1990, and as a Special Agent (GS-1811) since April 1992.
2. DHS regulations, Title 6, Code of Federal Regulations, Section 5.4, and Appendix A, II(I)(3), 68 FR 4056, 4058, and 4069, vest authority in the Secret Service FOI/PA officer

to make determinations as to whether to grant requests for access to Secret Service records made under the Freedom of Information Act (“FOIA”), Title 5 of the United States Code, Section 552(b).

3. This declaration is submitted to describe the Secret Service’s search for and processing of records potentially responsive to Plaintiffs’ March 10, 2017 FOIA request seeking (1) Worker and Visitor Entry System (WAVES) and Access Control Records (ACR) records and (2) records of “presidential visitors” at Trump Tower, in New York City, and Mar-a-Lago, in West Palm Beach, and specifically certain fields of data within such records, for the period January 20 through March 8, 2017. This declaration is based upon my personal knowledge, upon review of the documents described in paragraph 28 below, upon information contained in the Secret Service’s files, and upon information acquired by me during the performance of my official duties from other Secret Service employees who were involved in the search for and processing of records potentially responsive to Plaintiffs’ FOIA request.

Plaintiffs’ Requests and the Initial Processing of those Requests

4. I am aware that Plaintiffs allege in the above-captioned lawsuit that on January 23, 2017, Plaintiff Kate Doyle sent a FOIA request to the Secret Service requesting WAVES and ACR records for January 20, January 21, and January 22, 2017. My office does not have a record of receiving this request in the ordinary course of business. I understand, however, that after filing this lawsuit, Plaintiffs provided a document purporting to indicate that a fax was sent to the Secret Service FOIA/PA Communications Center on January 23, 2017.

5. I am also aware that Plaintiffs allege that on February 24, 2017, Plaintiff Doyle sent an administrative appeal to DHS based on the Secret Service's failure to respond to her January 23, 2017 request. The Secret Service has no record of receiving or being notified of this appeal in the ordinary course of business. I understand, however, that after filing this lawsuit, Plaintiffs provided a document purporting to indicate that a fax was sent to the DHS Office of General Counsel on February 24, 2017.
6. The Secret Service did receive a March 10, 2017 request from Plaintiffs seeking (1) WAVES and ACR records from January 20, 2017 until March 8, 2017 (assigned as Request Number 20171321); (2) records of Presidential visitors at Mar-a-Lago from January 20, 2017 to March 8, 2017 (assigned as Request Number 20171322); and (3) records of Presidential visitors at Trump Tower from January 20, 2017 to March 8, 2017 (assigned as Request Number 20171323). Plaintiffs' request stated that "this request [the three requests set out above] specifically seeks the same 28 fields of data that previously were posted on the White House Visitor Records Request website." My office acknowledged receipt of the March 10, 2017 request on April 11, 2017. Attached to this declaration as Exhibit A is a copy of the March 10, 2017 request and my office's April 11, 2017 letter.
7. With respect to the requests of January 23, 2017 and March 10, 2017 seeking WAVES and ACR records, these records are not Secret Service records, but rather are Presidential Records pursuant to the Presidential Records Act (PRA), 44 U.S.C. § 2201 et seq. Therefore, my office did not seek to search for, locate, or process these records.
8. With respect to the request for records of Presidential visitors at Trump Tower, the Secret Service was aware that President Trump had not traveled to Trump Tower during the

requested time period. Therefore, after confirming this information, the Secret Service did not seek to search for the material requested by Plaintiffs.

9. With respect to the request for records of Presidential visitors at Mar-a-Lago, at the time of Plaintiffs' request, the Secret Service's protective efforts at the Mar-a-Lago location and the particular protective situation at that location were newly developed. While it could easily be confirmed that the Secret Service does not utilize WAVES or ACR records at Mar-a-Lago, it was unclear what, if any, record systems or record groupings might exist in regard to who visited the President at Mar-a-Lago, or where such record systems or record groupings might be located.
10. In order to clarify this issue, it was determined that a broad set of searches would be conducted to determine what, if any, record systems or record groupings existed that might contain information potentially responsive to Plaintiffs' request, in particular the request for the 28 fields of data found in the previously posted WAVES records.
11. This search is described below. It is noted, however, that the below search confirmed that there is no system for keeping track of visitors to Mar-a-Lago, as there is at the White House Complex. Specifically, there is no Secret Service system that controls access to Mar-a-Lago, nor is there any grouping, listing, or set of records that would reflect Presidential visitors to Mar-a-Lago. This result is consistent with the fact that the Secret Service is not charged with the protection of Mar-a-Lago as it is with the White House Complex pursuant to title 18 of the United States Code, section 3056A(a).
12. Additionally, as for Plaintiffs' specific request for Mar-a-Lago "Presidential visitor" records containing "the same 28 fields of data that previously were posted on the White House Visitor Records Request web site," the below search confirmed that the Secret

Service does not maintain, nor does it have access to, any data system, grouping of records, listing, or document(s) that contains those 28 fields or any limited subset of those fields.

13. As the Secret Service's search revealed that the Secret Service neither maintained, nor had access to, any Mar-a-Lago visitor record(s) or listing or database containing the same 28 fields specifically sought by Plaintiffs' request or any subset of those fields, the Secret Service maintains no record and has no access to any record directly responsive to Plaintiffs' request for records of presidential visitors at Mar-a-Lago.

14. Even after the broad search that the Secret Service conducted in regard to Plaintiffs' request for records of Presidential visitors at Mar-a-Lago, and even setting aside Plaintiffs' specific request for the "28 fields" of previously posted data, the Secret Service's search identified only one record subject to the Federal Records Act (FRA) and the FOIA that is arguably responsive to Plaintiffs' request and not duplicative of information previously made public by the White House. That record is a two page e-mail from the Department of State that was ultimately forwarded to the Secret Service. That record was released to Plaintiffs with redactions as described below.

15. In order to more fully explain the Secret Service's search efforts and the few scattered and repetitive pieces of Mar-a-Lago Presidential visitor information found in paper or electronic documents located through this search, that search and those documents are further described below.

The Secret Service's Searches

16. In searching for information indicating whether the Secret Service maintained a system or grouping of information indicating that an individual or individuals had visited or met

with the President at Mar-a-Lago during the time period requested, the following offices were identified as offices that could potentially have access to responsive documents:

the Office of Strategic Intelligence and Information (SII), which oversees the Protective Intelligence Division (PID). This office conducts background checks pursuant to a sensitive security program;

the Office of Investigations (INV), which oversees the Miami Field Office (FO) and the West Palm Beach Resident Office (RO). These offices would most likely have involvement in President Trump's visits to Mar-a-Lago as they are geographically located in proximity to Mar-a-Lago; and

the Office of Protective Operations (OPO), which oversees the Presidential Protective Division (PPD). This is the division with direct operational responsibility for the protection of the President of the United States, including when the President is at Mar-a-Lago.

17. The SII/PID's search for records of background checks for presidential visitors to Mar-a-Lago for the time period January 20 to March 8, 2017 identified no responsive records.
18. The INV/Miami FO and INV/West Palm Beach RO searched for paper and electronic records that reflected that an individual visited with the President at Mar-a-Lago during the time period January 20 to March 8, 2017, and forwarded potentially responsive records for further responsiveness review.
19. The OPO/PPD searched for paper or electronic records that reflected that an individual visited with the President at Mar-a-Lago during the time period January 20 to March 8, 2017, and forwarded potentially responsive records for further responsiveness review.
20. In addition to the Division-specific searches requested and conducted as indicated above, it was also requested that the Office of the Chief Information Officer (CIO) conduct a search of the e-mail accounts of employees of PPD, the Dignitary Protective Division

(DPD),¹ West Palm Beach RO, and Miami FO for the time period January 20 to March 8, 2017 in the Enterprise Vault, or E-Vault. The E-Vault contains e-mails sent, received, or deleted by all Secret Service employees including during the time period at issue in this case. The E-Vault was searched with the following search terms in the body, subject line, or attachment: **MAL OR Mar-a-Lago OR Mar a Lago AND** at least one of the following terms: **guest OR appointment OR visitor OR meet OR meeting OR clear OR cleared OR sweep OR swept OR checkpoint OR check point OR check OR [abbreviation for sensitive security program] OR background.** A large volume of e-mails, some with attachments, were located through this search, and forwarded for responsiveness review.

Further Responsiveness Review

21. E-mails and their attachments retrieved through the above-described word searches were placed into software that allows for reviewing and tagging, and duplicate e-mails were removed. Duplicates were also removed from the OPO/PPD e-mails that had been located through OPO/PPD's search and forwarded for review, many of which had been also been located through the CIO's word search.
22. The e-mails and attachments and other documents remaining after de-duplication were then reviewed for responsiveness. Over four thousand e-mails and documents were left to review even after de-duplication.
23. In the course of this further review, it was determined that many of the e-mails and attachments were merely copies of media reports concerning Presidential visits to Mar-a-Lago. This material was eliminated from further review as non-responsive, as it was not

¹ E-mail accounts of DPD employees were searched as it appeared that the Prime Minister of Japan had visited Mar-a-Lago to visit with President Trump during the relevant time period.

considered an Agency record of a Presidential visit, and it was as available to the public as to the Secret Service.

24. In reviewing the remaining records, questions arose as to who should be considered a Presidential visitor to Mar-a-Lago. I was advised, however, that through discussions between Plaintiffs' counsel and the Department of Justice attorneys representing the Secret Service (DOJ), it was agreed that the Secret Service need not produce records regarding Presidential family members, cabinet members, and White House staff who were present at Mar-a-Lago, as those individuals' names generally would not have appeared in WAVES. Therefore, any documents reflecting that such individuals were present at Mar-a-Lago were removed as non-responsive.

25. The Secret Service also identified a few records reflecting the names of local law enforcement and support personnel scheduled to have their photographs taken with the President. It was uncertain whether these records reflect the names of individuals who in fact visited the President at Mar-a-Lago, or were only scheduled to do so. It is my understanding, however, that Plaintiffs agreed, after discussions with DOJ, that they were not interested in the production of records regarding individuals who were scheduled to have their pictures taken with President Trump at Mar-a-Lago. Therefore, these records were considered non-responsive to Plaintiffs' request.

26. Documents relating to the visit of the Prime Minister of Japan, Shinzo Abe, to Mar-a-Lago were the largest remaining category of records captured through the above-described searches. This result is consistent with the Secret Service's protective responsibilities; as a visiting Head of State traveling with his spouse in the United States, Prime Minister Abe and Mrs. Abe were Secret Service protectees, see 18 U.S.C. 3056(a).

Therefore, the Secret Service had created and maintained operational records concerning its protective efforts during Prime Minister Abe's visit to the United States, and some of these records referred to the visit of the Prime Minister and his wife to Mar-a-Lago.

27. Aside from the documents relating to the Japanese Prime Minister's visit, the Secret Service's search located only a handful of records that referred to individuals who were scheduled to meet with the President at Mar-a-Lago.
28. A page by page review of the documents concerning the Japanese Prime Minister's visit and the few other documents referring to individuals who were scheduled to meet with the President at Mar-a-Lago, as identified in paragraphs 26 and 27 above (which are each comprised of multiple records), was conducted to determine whether they contained any information concerning a Presidential visitor at Mar-a-Lago. Based on this review it was determined that the Secret Service's search for material arguably responsive to Plaintiffs' FOIA request had located the following:
 - i. three White House documents, received from the White House Office, titled "Official Travel Schedule, the Visit of the President to Palm Beach, Fl," for the dates of February 10, 2017, February 11, 2017, and February 12, 2017, respectively (hereinafter White House Official Travel Schedules);
 - ii. a White House document, received from the White House Office, titled "Schedule of the President, Sunday, February 12, 2017;"
 - iii. an e-mail from the White House Office containing the President's schedule for February 10, 2017;
 - iv. an e-mail from the White House Office containing the White House Chief of Staff's Schedule, which includes an entry referring to the President's dinner with the Prime Minister of Japan at Mar-a-Lago on February 10, 2017;
 - v. two Secret Service emails containing the President's schedules for February 10, 2017, and February 11, 2017, respectively, obtained from the White House Office;

- vi. three e-mails from the White House Office to PPD each providing specific information concerning the arrival of an individual who was scheduled to meet with the President on February 12 or February 19, 2017, and the person(s) accompanying the individual;
- vii. a Secret Service email containing a “Final Intelligence Situation Report for the visit of President Donald J. Trump . . . to Palm Beach, FL” from February 10-12, 2017, containing the statement that the President and First Lady are traveling to Palm Beach, FL to host the Prime Minister of Japan;
- viii. a Secret Service intelligence assessment titled “Foreign Dignitary Assessment - Japan,” prepared by the Secret Service’s PID for the visit of Prime Minister Abe, containing the statement that the Prime Minister will meet with the President at Mar-a-Lago;
- ix. a letter from the Secret Service to the Federal Bureau of Investigation (FBI), advising that the President and First Lady would be visiting the FBI’s West Palm Beach Resident Office district on February 10-12, 2017, and noting that the Prime Minister of Japan and Spouse will stay as guests of President Trump at the Mar-a-Lago Club;
- x. a Secret Service document titled “Special Operations Division (SOD) Joint Tactical Survey” for the visit of President Donald Trump and family to Palm Beach, Florida, February 10-12, 2017, containing two references to the fact that the President will be hosting and meeting with the Prime Minister of Japan and Spouse at Mar-a-Lago;
- xi. seven internal Secret Service e-mails containing or forwarding Secret Service operational, scheduling, reporting, or Presidential or other event information, including Presidential scheduling information obtained from the White House Office, and each containing a notation that the Prime Minister of Japan would be meeting or dining with the President at Mar-a-Lago; and
- xii. an e-mail from the Department of State, Office of the Chief of Protocol, that was sent to the White House Office and forwarded to the Secret Service, providing a listing of the names of individuals (and their titles or job responsibilities) who would be accompanying the Prime Minister of Japan and his wife during their visit to Mar-a-Lago.

29. All of the documents identified above indicate the possibility of a “presidential visit” (e.g., a document indicating that a person is scheduled to meet with the President in the future). The documents do not reveal whether a visit actually took place.

Consultation and Referral of Records for Review

30. With respect to the three White House Official Travel Schedules (category i) and the other Presidential (or White House Chief of Staff) schedules (categories ii through v), a review of these materials indicated that the documents themselves and/or the Presidential schedules contained within the documents had originated from the White House Office. Similarly, the three e-mails from EOP/WHO to PPD providing specific information concerning the arrival of particular individuals scheduled to meet with the President and person(s) accompanying those individuals (category vi) had originated from the White House Office, and directly relate to the President's schedule. In addition, discrete portions of some of the seven operational emails (category xi) consist of Presidential schedule information obtained from the White House Office.

31. All of the Presidential schedule documents and related information were transmitted through the DOJ to the White House for consultation. As a result of this consultation, it was determined that all of these records contain, reflect, or directly relate to Presidential schedules. The Presidential schedules and related information were "created . . . by the immediate staff [of the President], or a unit or individual of the Executive Office of the President . . . , in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President," 44 U.S.C. § 2201, and thus they are Presidential records within the meaning of the PRA. In addition, the Presidential schedules and related information were transmitted by the White House Office to the Secret Service for the narrow and limited purpose of providing the information necessary for the Secret Service to perform

its statutory duty to protect the President. As such, these materials were not viewed as subject to the FOIA, and they were not further processed under the FOIA.

32. In regard to the remaining documents, the Final Intelligence Situation Report (category vii), the Dignitary Assessment (category viii), the letter to the FBI (category ix), the Joint Tactical Survey (category x), and the seven operational e-mails (category xi), it was determined that these documents are not records of Presidential visitors at Mar-a-Lago, but rather operational material that merely contain a repeated statement that the Prime Minister of Japan and his spouse would be meeting or dining or present with the President and First Lady at Mar-a-Lago, a widely published fact that has already disclosed by the White House. This information is also duplicative of the information contained in the State Department email (category xii), which was processed and released to Plaintiffs with redactions as discussed in paragraph 33 below.² Therefore, it was determined that these materials were not records responsive to Plaintiffs' FOIA request for records of Presidential visitors at Mar-a-Lago.

33. In regard to the e-mail that had originated with the Department of State (category xii), this email was deemed responsive to Plaintiffs' FOIA request because it evidenced potential visitors to Mar-a-Lago, some of whom were scheduled to attend a dinner with the President. This e-mail was referred to the Department of State for review as to the existing equities of that Department. After review the document was returned to the Secret Service and subsequently released to Plaintiffs with the names, email addresses, and a cell phone number of third parties redacted pursuant to FOIA exemptions (b)(6) and (b)(7)(C). A description of and explanation for the redactions is set out below.

² The emails containing Presidential schedules for February 10 and 11, 2017 (categories iii-v) are also duplicative for the same reasons.

FOIA Exemptions Claimed

34. Title 5, United States Code, Section 552(b)(6) exempts from disclosure “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Information that applies to or describes a particular individual qualifies as “personnel,” “medical,” or “similar files” under exemption (b)(6). This exemption protects both government officials and private third parties whose identities are revealed in government records from unwarranted invasion of their personal privacy that would not shed light on government activities.
35. Title 5, United States Code, Section 552(b)(7)(C) exempts from disclosure “records or information compiled for law enforcement purposes” the disclosure of which “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” This exemption protects, among other information, the identifying information of government personnel and third parties that has been compiled for law enforcement purposes.
36. The Secret Service is a criminal law enforcement and security agency created under Title 18, United States Code, Section 3056. All of the materials identified as responsive to Plaintiffs’ FOIA request were compiled in connection with the Secret Service’s protective and/or investigative mission. As such, these Secret Service records meet the threshold requirement of exemption (b)(7) of having been compiled for law enforcement purposes.
37. The Secret Service is invoking exemptions (b)(6) and (b)(7)(C) to withhold the name and email address of one EOP employee, and the names, certain e-mail addresses, and one cell phone number of non-visitor third parties whose names and contact information

appear on these documents and who provided information to be used by the Secret Service in connection with its protective or investigative mission.

38. In making the determination to withhold these names, e-mail addresses, and cell phone number, the Secret Service balanced the public's interest in disclosure against the rights of these third parties and EOP employee to personal privacy, and determined that the privacy rights of the third parties and EOP employee outweighed any public interest in disclosure. The Secret Service determined that there is no cognizable public interest in the disclosure of this information, because such information reveals nothing about the manner in which the Secret Service conducts its activities. Given these factors, the Secret Service determined that the privacy rights of the third parties and EOP employee outweigh the public's interest in disclosure.

Segregation

39. Every effort has been made to provide the Plaintiffs with all reasonably segregable portions of the State Department email. No reasonably segregable, non-exempt portions of the email have been withheld from Plaintiffs.

Conclusion

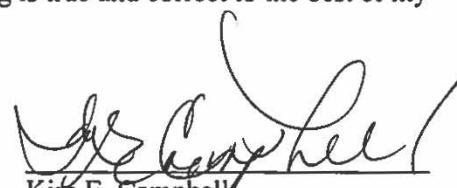
40. The Secret Service has searched for, located, reviewed, and released to Plaintiffs one record responsive to their request. The Secret Service has released as much information as possible and has processed the record to withhold only the information that it has determined can be withheld pursuant to valid FOIA exemptions. The additional material located and reviewed by the Secret Service is PRA material not subject to the FOIA and/or duplicative of information (specifically, the fact that the Japanese Prime Minister and his wife were scheduled to meet or dine with the President at Mar-a-Lago on

February 10 and 11) which has already been made public by the White House and/or was contained in the State Department email released to Plaintiffs.

41. The Secret Service has made every effort to comply with the intent of the FOIA, while protecting personal privacy of an EOP employee and third parties.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

18/23/17
Date



Kim E. Campbell
Special Agent in Charge,
Freedom of Information Act and
Privacy Act Officer
Liaison Division
United States Secret Service

The National Security Archive

New York Office
120 Wall Street
31st Floor
New York, NY 10005
nsarchive.org



Kate Doyle
Senior Analyst
Tel: (646) 792-7254

March 10, 2017

FOIA Officer
Secret Service
Communications Center (FOIA/PA)
245 Murray Lane
Building T-5
Washington, D.C. 20223

Re: Expedited Request under the FOIA

Dear FOIA Officer:

Pursuant to the Freedom of Information Act (FOIA), Kate Doyle, on behalf of herself and the National Security Archive, the Knight First Amendment Institute at Columbia University, and Citizens for Responsibility and Ethics in Washington hereby request the following:

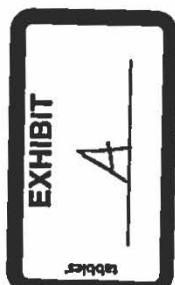
(1) *The Worker and Visitor Entrance System (WAVES) records and Access Control Records System (ACR) records dating from January 20, 2017 until March 8, 2017.*

(2) *Records of presidential visitors at Mar-a-Lago and Trump Tower from January 20, 2017 to March 8, 2017.*

This request specifically seeks the same 28 fields of data that previously were posted on the White House Visitor Records Requests website.

Pursuant to the FOIA and Department of Homeland Security regulations, we request expedition of this request because it involves an urgency to inform the public about an actual or alleged federal government activity and is made by entities primarily engaged in disseminating information. Further, the subject of this request concerns a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

White House visitor logs, first made available by the Obama administration, have proven to be an invaluable resource in determining the outside influences to which the president is subject. Countless articles have been written by a wide variety of publications based in part on information gleaned from the visitor logs. Moreover, significant concerns have been raised about how the president is using his private properties at Mar-a-Lago and Trump Tower. The requested records will shed light on this equally important issue. Underlining the exceptional interest in accessing these logs, eight Senators sent letters to the president and Secret Service on March 6, 2017, urging the release of the WAVES data. The issue has been covered by media publications including *The Daily Beast* and *Politico*. Under these circumstances this request



An independent non-governmental research institute and library located at the George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act. Publication royalties and tax deductible contributions through The National Security Archive Fund, Inc. underwrite the Archive's Budget.

qualifies for expedition.

If you regard any of these documents as potentially exempt from the FOIA's disclosure requirements, we request that you nonetheless exercise your discretion to disclose them. As the FOIA requires, please release all reasonably segregable non-exempt portions of documents. To permit us to reach an intelligent and informed decision whether or not to file an administrative appeal of any denied material, please describe any withheld records (or portions thereof) and explain the basis for your exemption claims.

Ms. Doyle is the National Security Archive's senior analyst of U.S. policy in Latin America. Based at the Archive's office in New York, she works with other scholars, journalists, human rights groups, truth commissions, prosecutors and judges to open and analyze government files from secret archives that shed light on state violence. She is the author of several dozen book chapters and articles that have appeared in scholarly publications such as the *World Policy Journal* and in media ranging from *Harper's Magazine* to Mexico's *Proceso*.

The Knight First Amendment Institute is a newly established organization at Columbia University dedicated to defending and strengthening the freedoms of speech and the press in the digital age. Research and public education are essential to the Institute's mission. Obtaining information about government activity, analyzing that information, and publishing and disseminating it to the press and public are among the core activities the Institute was established to perform.

Citizens for Responsibility and Ethics in Washington (CREW) is a non-profit corporation organized under section 501(c)(3) of the Internal Revenue Code. CREW is committed to protecting the public's right to be aware of the activities of government officials, to ensuring the integrity of those officials, and to highlighting and working to reduce the influence of money on politics. CREW uses a combination of research, litigation, and advocacy to advance its mission. CREW brought the original Freedom of Information case that persuaded the Obama administration to set up the automatic system of publishing White House visitor logs.

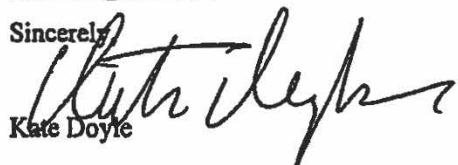
As a representative of the news media, the National Security Archive qualifies for "representative of the news media" status under 5 U.S.C. Sec. 552(a)(4)(A)(ii)(II) and, therefore, may not be charged search and review fees. (See *National Security Archive v. U.S. Department of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), *cert denied*, 110 S Ct. 1478 (1990)). This request is made as part of a scholarly and news research project that is intended for publication and is not for commercial use. For details on the Archive's research and extensive publication activities please see our website at www.nsarchive.org.

The Knight Institute also qualifies for a waiver of search and review fees on the grounds that it qualifies both as a "representative of the news media" and as an "educational . . . institution" whose purposes include "scholarly . . . research" and the records are not sought for commercial use. 5 U.S.C. § 552(a)(4)(A)(ii)(II). Situated within a prominent academic research university, the Institute will perform scholarly research on the application of the First Amendment in the digital era. The Institute is in the midst of inaugurating a research program that will bring together academics and practitioners of different disciplines to study contemporary First Amendment issues and offer informed, non-partisan commentary and solutions. It will publish that commentary in many forms—in scholarly publications, in long-form reports, and in short-form essays.

Please notify me before incurring any photocopying costs over \$100.

If you have any questions regarding the identity of these records, their location, the scope of the request or any other matters, please call me by phone at (646) 792-7254 or via e-mail at foiamail@gwu.edu.

Sincerely,



Kate Doyle

Cc: Jameel Jaffer, Founding Director, Knight First Amendment Institute, Columbia University

Tom Blanton, Executive Director, National Security Archive

Anne Weismann, Chief FOIA Counsel, Citizens for Responsibility and Ethics in Washington

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3/10/2017

WhM1a3.PNG

NAME/LAST	NAME/FIRST	NAME/MID	LEN	REGNR	Type of Access	TDA	POA	TOD	POD	PPD	MADE DATE
1 MATTHEWS	GARY		7	STARAK	AL						05/15/2010 11:50:00 AM
2 DOYLE	PATRICIA		8	STARAK	AL						05/03/2010 05:53:00 AM
3 MATTHEWS	SANDY		7	STARAK	AL						05/15/2010 11:50:00 AM
4 MALONE	SHARON		7	STARAK	AL						05/03/2010 01:03:00 PM
5 WILSON	WELLINGTON		8	STARAK	AL						05/09/2010 01:05:00 PM
6 ABSE	SABA		6	STARAK	AL						04/27/2010 07:23:00 PM
7 ABRAHAM	ABSE		6	STARAK	AL						04/27/2010 05:53:00 PM
8 ABRAHAM	AZZEGASH	H	7	STARAK	AL						05/07/2010 05:53:00 PM
9 ABRAHAM	ATTU	A	6	STARAK	AL						05/08/2010 10:33:00 AM
10 ABRAHAM	YOHANNES	A	7	STARAK	AL						05/07/2010 05:53:00 PM
11 ABRAMS	COURTNEY	E	7	STARAK	AL						05/13/2010 07:19:00 AM
12 ACCINERO	SRENDA		7	STARAK	AL						05/09/2010 10:07:00 AM
13 ACCINERO	MOE		6	STARAK	AL						05/09/2010 10:05:00 AM
14 ACEVEDO	ELIZABETH		8	STARAK	AL						05/09/2010 05:53:00 AM
15 ACKERMAN	ERNEST	A	6	STARAK	AL						05/03/2010 05:53:00 AM
16 ACKERMAN	JESSALYN	M	7	STARAK	AL						05/03/2010 05:53:00 AM
17 ADAS	PATRICIA	E	7	STARAK	AL						05/13/2010 07:19:00 AM
18 ADAMS	DIAMOND	M	7	STARAK	AL						05/13/2010 07:19:00 AM
19 ADAMS	EMERALD	S	7	STARAK	AL						05/12/2010 07:19:00 AM
20 ADAMS	LAMONT	P	7	STARAK	AL						05/13/2010 07:19:00 AM
21 ADAMS	SUSAN	M	7	STARAK	AL						04/29/2010 05:21:00 PM
22 ADOLONA	DE		6	STARAK	AL						05/15/2010 11:26:00 AM
23 ADLER	JUDY		6	STARAK	AL						05/09/2010 01:57:00 PM
24 ADLER	MATTHEW	P	7	STARAK	AL						05/13/2010 07:19:00 AM
25 ADLER	MICHAEL		7	STARAK	AL						05/09/2010 01:57:00 PM
26 ADORNATO	MARIELA	A	7	STARAK	AL						05/07/2010 07:06:00 PM
27 ADORNATO	CELIA	V	7	STARAK	AL						05/13/2010 07:19:00 AM
28 AGUAYO	LILLIANNE	P	7	STARAK	AL						04/27/2010 07:19:00 PM
29 AGUILAR	ERJUS	I	6	STARAK	AL						05/13/2010 07:05:00 AM
30 AGUILAR	MARIA	T	7	STARAK	AL						04/30/2010 12:57:00 PM

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2017-10-23 14:47 EDT

3/10/2017 whv12a3.PNG

APP1	APP1_START_DATE	APP1_END_DATE	APP1_CANCEL	LastPeople	LAST_UPDATED_DATE	LastInDate	TERRITORIAL	SUP	...
1	5/19/10 7:00	5/19/10 23:00		1,275 LC	WIN	5/13/10 1:30	LC	POTUS	
2	5/19/10 7:00	5/19/10 23:00		1,275 RS	WIN	5/3/10 6:03	RS	POTUS	
3	5/19/10 7:00	5/19/10 23:00		1,275 LC	WIN	5/13/10 1:30	LC	POTUS	
4	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/9/10 13:08	DC	POTUS	
5	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/9/10 13:08	DC	POTUS	
6	5/19/10 7:00	5/19/10 23:00		1,275 GS	WIN	4/27/10 19:25	GS	POTUS	
7	5/19/10 7:00	5/19/10 23:00		1,275 LC	WIN	5/7/10 18:59	LC	POTUS	
8	5/19/10 7:00	5/19/10 23:00		1,275 LC	WIN	5/7/10 18:59	LC	POTUS	
9	5/19/10 7:00	5/19/10 23:00		1,275 LC	WIN	5/8/10 10:39	LC	POTUS	
10	5/19/10 7:00	5/19/10 23:00		1,275 LC	WIN	5/7/10 18:59	LC	POTUS	
11	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/13/10 7:19	DC	POTUS	
12	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/9/10 10:08	DC	POTUS	
13	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/9/10 10:08	DC	POTUS	
14	5/19/10 7:00	5/19/10 23:00		1,275 RS	WIN	5/3/10 6:03	RS	POTUS	
15	5/19/10 7:00	5/19/10 23:00		1,275 RS	WIN	5/3/10 6:03	RS	POTUS	
16	5/19/10 7:00	5/19/10 23:00		1,275 RS	WIN	5/3/10 6:03	RS	POTUS	
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21	5/19/10 7:00	5/19/10 23:00		1,275 RS	WIN	4/29/10 18:21	RS	POTUS	
22	5/19/10 7:00	5/19/10 23:00		1,275 LC	WIN	5/13/10 11:29	LC	POTUS	
23	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/9/10 13:07	DC	POTUS	
24	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/13/10 7:19	DC	POTUS	
25	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/9/10 13:07	DC	POTUS	
26	5/19/10 7:00	5/19/10 23:00		1,275 LC	WIN	5/7/10 19:06	LC	POTUS	
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29	5/19/10 7:00	5/19/10 23:00		1,275 DC	WIN	5/13/10 7:19	DC	POTUS	
30	5/19/10 7:00	5/19/10 23:00		1,275 RS	WIN	4/30/10 2:27	RS	POTUS	

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Catalog Developers f g Q Search SITEMAP

White House Visitor Records Requests
A list of White House Visitor Record requests.

Filter in this Dataset

MEETING LOC	MEETING ROOM	CALLER NAME LAST	CALLER NAME FIRST	CALLER ROOM	Description	RELEASE DATE
1 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
2 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
3 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
4 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
5 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
6 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
7 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
8 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
9 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
10 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
11 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
12 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
13 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
14 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
15 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
16 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
17 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
18 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
19 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
20 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
21 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
22 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
23 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
24 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
25 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
26 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
27 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
28 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
29 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00
30 WH	S GROUNDS	OFFICE	VISITORS		STATE ARRIVAL - ME2000**	03/27/2010 03:00:00

FOIA

From: FOIA
Sent: Tuesday, April 11, 2017 11:00 AM
To: 'foiamail@gwu.edu'
Subject: FOIA File Numbers 20171321-20171323
Attachments: 20171321-20171323.pdf

Dear Requester,

Please see the attached letter regarding the status of your FOIA/PA request. If you have any questions in regard to this matter, please contact this office at (202) 406-6370.

Thank You,

Freedom of Information Act & Privacy Act Program
United States Secret Service
245 Murray Lane, SW, Building T-5
Washington, DC 20223
Phone: (202) 406-6370
Fax: (202) 406-5586
Email: FOIA@USSS.DHS.GOV



DEPARTMENT OF HOMELAND SECURITY
UNITED STATES SECRET SERVICE
WASHINGTON, D.C. 20223

Freedom of Information Act & Privacy Act Program
Communications Center
245 Murray Lane, SW, Building T-5
Washington, D.C. 20223

Date: APR 11 2017

The National Security Archive
New York Office - 120 Wall Street 31st Floor
New York, NY 10005
Attn: Kate Doyle

File Numbers: 20171321 - 20171323

Dear Requester:

This letter is intended to acknowledge the receipt of your recent Freedom of Information Act (FOIA) request, received by the United States Secret Service (Secret Service) on March 10, 2017, for information pertaining to:

File Number 20171321: The Worker and Visitor Entrance System (WAVES) records and Access Control Records System (ACR) records from January 20, 2017 until March 8, 2017;

File Number 20171322: Records of presidential visitors at Mar-a-Lago from January 20, 2017 to March 8, 2017; and

File Number 20171323: Records of presidential visitors at Trump Tower from January 20, 2017 to March 8, 2017.

You have requested expedited processing of your request under the Department of Homeland Security (DHS) standard permitting expedition when a requester demonstrates a "compelling need."

Your request, for expedited treatment, has been denied.

Under the DHS/FOIA regulation, 6 C.F.R., Chapter I, Part 5 § 5.5, expedited processing of a FOIA request is warranted if the request involves "circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual" ((d)(1)(i)), or "an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information" ((d)(1)(ii)). Requesters that seek expedited processing must submit a statement explaining, in detail, the basis for the request. Additionally, FOIA regulation, 6 C.F.R., Chapter I, Part 5 § 5.5(d)(3), requires that statements be certified, by the requester, to be "true and correct to the best of that person's knowledge and belief."

Your request has been denied because you do not qualify under either category. Clearly, you have not demonstrated that there is a threat to the life or physical safety of an individual nor have you demonstrated there is a particular urgency to inform the public about the government activity involved in the request, beyond the public's right to know about government activity, generally. Your letter was conclusory in nature and did not present any facts to justify a grant of expedited processing under the applicable standards.

Additionally, provisions of the Act allow us to recover part of the cost of complying with your request. We shall charge you for the records in accordance with Interim FOIA regulations as they apply to "all other" requesters. The first 100 pages of duplication are free of charge. As an "all other" requester, you will be charged .10 cents a page for the duplication of each additional page. As an "all other" requester, the first 2 hours of search time are free of charge, after which you will be charged the per quarter-hour rate (\$4.00, \$7.00, \$10.25) of the searcher.

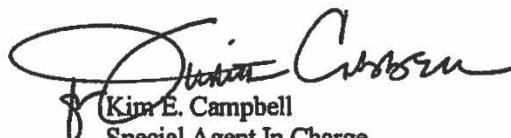
Please be advised, the submission of your request is considered a firm commitment by you to pay all applicable duplication and search time costs charged, under 6 C.F.R., Chapter I, Part 5 § 5.11, up to \$25.00. A search for files responsive to your request is being conducted. The appropriate components of the Secret Service are being queried for responsive documents. If any responsive records are located, they will be reviewed for a disclosure determination. You will be contacted before any additional fees are accrued.

If you deem the decision to deny expedited treatment to your request an adverse determination, you may exercise your appeal rights. Should you wish to file an administrative appeal, your appeal should be made in writing and received within sixty (60) days of the date of this letter, by writing to: Freedom of Information Appeal, Deputy Director, U.S. Secret Service, Communications Center, 245 Murray Lane, S.W., Building T-5, Washington, D.C. 20223. If you choose to file an administrative appeal, please explain the basis of your appeal and reference the case number listed above.

Your request has been assigned FOIA File Numbers 20171321 - 20171323. We solicit your cooperation and assure you that the search will be conducted as expeditiously as possible.

To check the status of your FOIA request, please contact this office at (202) 406-6370. Please use the file number indicated above in all future correspondence with this office.

Sincerely,



Kim E. Campbell
Special Agent In Charge
Freedom of Information Act & Privacy Act Officer

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE, et al.,)
Plaintiffs,)
v.)
U.S. DEPARTMENT OF HOMELAND SECURITY,)
et al.,)
Defendants.)
)

**DECLARATION OF JAMES M. MURRAY
DEPUTY ASSISTANT DIRECTOR
OFFICE OF PROTECTIVE OPERATIONS
UNITED STATES SECRET SERVICE**

I, James M. Murray, make the following declaration in lieu of affidavit pursuant to 28 U.S.C. §1746:

1. I am employed by the United States Secret Service (“Secret Service” or “Agency”) as a Deputy Assistant Director (“DAD”), Office of Protective Operations (“OPO”). This is an SES position, ES-1811-00. I have been employed by the Secret Service since 1995 and assigned as the DAD of the OPO since April of 2016.
2. In this position, I oversee the Presidential Protective Division and protective operations on and around the White House Complex, including the Secret Service’s involvement with the Worker and Visitor Entrance System (WAVES).

Functions of the Secret Service

3. The Secret Service is a protective and law enforcement agency operating under the provisions of Title 18 of the United States Code, Sections 3056 and 3056A. Pursuant to Section 3056(a), the Secret Service is charged with the protection of the President and Vice President of the United States and their immediate families; major candidates for President and Vice President of the United States and their spouses; the President-elect and Vice President-elect and their immediate families; former Presidents and Vice Presidents of the United States, their spouses, and minor children; visiting foreign heads of state and heads of government; and certain other individuals as directed by the President of the United States. By statute, the Secret Service's protection of the President and Vice President (as well as the President-elect and Vice President-elect) is mandatory. Additionally, pursuant to Section 3056A(a), the Secret Service is authorized to protect the White House Complex and the Vice President's official residence; foreign diplomatic missions in the Washington, D.C. area, and certain other locations within the United States; designated events of national significance; as well as other locations. The Secret Service does not have a similar statutory authority to protect Mar-a-Lago or Trump Tower.
4. OPO is a directorate in the Secret Service that manages various operational and support functions. The OPO is responsible for establishing policies related to the Secret Service's protective mission and for overseeing the operational divisions that protect the persons, places, and events that the Secret Service is authorized to protect. In my capacity as the Deputy Assistant Director of the OPO, the representations made in this

declaration are made on behalf of the Secret Service as an agency and not solely on behalf of the OPO.

5. The “White House Complex” (also “Complex”), for purposes of access as secured by the Secret Service, includes the White House; the Eisenhower Executive Office Building (“EEOB”), which is also known as the “Old Executive Office Building”; the grounds encompassing the EEOB and the White House; and the New Executive Office Building (“NEOB”). Housed in the White House, the EEOB, and the NEOB are the offices of various staff of the Executive Office of the President (“EOP”) and the Office of the Vice President.
6. As part of its function to provide protection for the White House Complex, the Secret Service monitors and controls access to the Complex.

Records Regarding the White House Complex

A. Record Types

7. The U.S. Secret Service utilizes two interrelated electronic systems, the Executive Facilities Access Control System (“EFACS”) – EFACS system, for controlling and monitoring access to the White House Complex, and the WAVES system, for vetting visitor information and granting access to the White House Complex.
8. When an authorized White House Complex passholder (including, but not limited to, members of the President’s and Vice President’s staffs) provides visit information to the Secret Service, they typically utilize either a system called “Appointment Center” or the “WAVES Request System” (“WRS”) to submit the request including all required personally identifiable information for the persons requesting access to the White House Complex. These systems are web-based applications allowing the users to securely

enter the sensitive information being requested. The Appointment Center website sends a link to the prospective visitor and the visitor fills out the required fields, which is then returned to the Appointment Center database. For most appointments, with the exception of East Wing tour groups, the information is automatically pulled from the Appointment Center into WAVES and held in draft until approved by an authorized passholder. With respect to the WRS, the EOP staffer who is requesting the appointment must fill out the required fields for prospective visitors. Once completed, the information is saved into WAVES directly. A Secret Service employee at the WAVES Center verifies that the requestor is authorized to make appointments for the specific location requested (for instance, an individual may only have authorization to make an appointment in the NEOB), fills in any additional necessary information¹ (or makes any changes, generally with the consent of the requestor), conducts background checks, and transmits the information electronically to the EFACS server. The Secret Service uses the information provided for the limited purposes of performing background checks to determine whether, and/or under what conditions, a visitor may be temporarily admitted to the Complex, and to verify the visitor's admissibility at the time of the visit.

9. WAVES records contain various fields, the majority of which contain information an authorized White House Complex passholder has provided to the Secret Service. Among those fields is a description field, which may contain comments provided by the authorized White House Complex passholder. For instance, a White House Complex passholder may enter information that the request relates to a large event such as a bill

¹ For instance, the WAVES Center employee may note that an escort for the visitor is needed.

signing. The note and description field may be annotated by Secret Service personnel with limited information as a result of background checks performed by the Secret Service and/or with instructions, including coded instructions, to Secret Service officers (such as security information, the name and/or initials of Secret Service personnel, or notes reflecting the circumstances pursuant to which an individual is to be admitted).

10. Once an individual is cleared into the White House Complex, he or she is generally issued an appropriate badge (although badges are often not issued for large groups, such as East Wing tours). Typically, an Access Control Record (“ACR”) is generated within the EFACS system whenever a badge is swiped over one of the electronic badge readers located at entrances to and exits from the White House Complex. ACR records include information such as the entrant’s name and badge number, the date and time of the swipe, and the post at which the swipe was recorded.

11. Once a visit takes place, WAVES records are typically updated electronically with ACR information showing the time and place of the entry into and exit from the White House Complex. (The time of arrival may differ slightly, however, between the WAVES and ACR records.) The after-visit records that combine WAVES and ACR information are still commonly referred to as WAVES records, though they may also occasionally be referred to as EFACS records.

12. The WAVES system was implemented at the Vice President’s Residence (“VPR”) on March 6, 2017. The EFACS system is still being configured for the VPR, and is not yet in production use at the VPR. Therefore, WAVES and ACR records are not generated at this time for the VPR.

B. Presidential Control over White House Access Records and the Maintenance of those Records

13. Once a visit to the White House Complex is complete, the Secret Service has no continuing interest sufficient to justify its own preservation or retention of WAVES or ACR records. Since at least 2001, it has been the practice of the Secret Service to transfer newly-generated WAVES records to the White House Office of Records Management (“WHORM”), generally every 30 to 60 days. (The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006). However, since at least 2009, the records have been transferred approximately every 30 days. It is the intent of the Secret Service that, once transferred, the WAVES records are to be erased from the computer system. Additionally, WAVES records older than 60 days are ordinarily purged daily via a type of “auto-delete” on a rolling basis and overwritten on the servers. Data that is auto-deleted includes appointment information, visitor information (including personally identifiable information), times of arrival and departure, and through which entry/exit points the visitor passed.
14. In May 2006, the Secret Service Records Management Program entered into a Memorandum of Understanding (“2006 MOU”) with the WHORM that documented what was then understood to be past practice and interests regarding WAVES and ACR records. The 2006 MOU also confirmed WHORM’s management and custody of the records under the Presidential Records Act. A true and correct copy of the 2006 MOU is attached hereto as Exhibit 1.
15. At least as early as 2001 (at the end of the Clinton Administration), and upon revisiting the issue in 2004, the Secret Service and the White House recognized and agreed that

ACR records should be treated in a manner generally consistent with the treatment of WAVES records. The White House and the Secret Service have determined that ACR records should be transferred to the WHORM and deleted from the Secret Service's computers like WAVES records. In May 2006, the Secret Service transferred to the WHORM ACR records covering the period from 12:00 p.m. on January 20, 2001 to April 30, 2006. (The Secret Service has also transferred to the National Archives and Records Administration ACR records covering the period from 12:00 p.m. on January 20, 1993, to 12:00 p.m. on January 20, 2001.) Currently, the after-visit records that are transferred to the WHORM constitute a combination of WAVES and ACR information.

16. WAVES servers are located at the Secret Service's headquarters in Washington, D.C., and Secret Service personnel operate this machinery. However, the President is the business owner of the EFACS and WAVES systems, and the Secret Service operates those systems on behalf of the President, acting as a service provider. This organizational restructuring was undertaken pursuant to the 2015 Memorandum of Understanding ("2015 MOU") entered into by the Presidential Technology Community regarding Presidential Information Technology Community Operations. The Secret Service operates turnstiles, runs background checks on White House Complex visitors, and provides status updates as a service provider to the President.

17. The 2015 MOU specifically states that "[a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component."

18. The Secret Service manages the data regarding access prior to the visit to the White House Complex. However, once a visit is complete, the Secret Service has no continuing interest in WAVES and ACR records.
19. In fact, because the records do not belong to the Secret Service, pursuant to the 2015 MOU, the Secret Service must request permission from the White House to view a record once a visit has concluded. Once the records have been transferred to the WHORM, should the Secret Service need access to the files, in addition to obtaining White House approval, the Secret Service must contact the WHORM to obtain access to the records.
20. Additionally, the Secret Service must request permission from the DWHIT to modify in any way the WAVES or EFACS systems, as the President is the business owner of the systems and the Secret Service operates them on behalf of the President.

C. Records Relating to the Current Litigation

21. In light of other pending federal litigation, Public Citizen v. DHS, Civ. Action No. 17-1669, pending in the U.S. District Court for the District of Columbia, and with the permission of the White House, for litigation hold purposes, the Secret Service has shut off the auto-delete of WAVES records effective August 19, 2017. The Secret Service will maintain a copy of the WAVES and ACR records that are sent to the WHORM during the pendency of that litigation, as well as this case.

Accessing the President's Schedule

22. The Secret Service relies on information regarding the President's schedule that is provided by the White House Office to fulfill its protective mission. Each evening, staff from the White House Office, including the Office of Presidential Scheduling and the

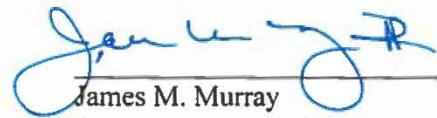
Office of Advance, sends the President's schedule to the Secret Service. White House Office staff transmit the daily schedule in two ways. First, they upload the schedule to an EOP web portal, accessible only to a limited number of Secret Service personnel with an operational need to know the scheduling information. Second, the web portal generates an automated email that is sent to a limited number of Secret Service personnel with an operational need to know the scheduling information.

23. A Secret Service employee who needs access to the President's schedule through either the web portal or the email must first request access from the White House Office. Only after a Secret Service employee is approved by the White House Office will he or she receive access to the web portal or the auto-generated email.
24. The Secret Service uses the Presidential schedule documents and information obtained from the White House Office solely to fulfill its operational needs. Such Presidential schedule documents and information belong to the White House Office and not the Secret Service. They are provided to and used by the Secret Service solely for the limited purpose of allowing the Secret Service to perform its statutory duty to protect the President, Vice President and other protectees, as well as the White House Complex.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

10/23/17

Date


James M. Murray
Deputy Assistant Director
Office of Protective Operations
United States Secret Service

MEMORANDUM OF UNDERSTANDING
Between the White House Office of Records Management and
the United States Secret Service Records Management Program
Governing Records Generated By the White House Access Control System.

INTRODUCTION

1. This MEMORANDUM OF UNDERSTANDING between the White House Office of Records Management ("White House") and the United States Secret Service Records Management Program ("the Secret Service") (collectively, "The Parties") memorializes and confirms the agreement governing the status and handling of records generated through the White House Access Control System.

DEFINITIONS

2. The White House Access Control System ("WHACS") includes two interrelated systems used by the Secret Service for controlling and monitoring access to the White House Complex:
 - a. The Worker and Visitor Entrance System ("WAVES");
 - b. The Access Control Records System ("ACR").
3. "WHACS Records" include "WAVES Records" and "ACR Records."
4. "WAVES Records" consist of records generated when an authorized White House pass holder submits to the Secret Service information about visitors (and workers) whose business requires their presence at the White House Complex.
 - a. WAVES Records include the following information submitted by the pass holder: the visitor's name; the visitor's date of birth; the visitor's Social Security Number; the time and location of the planned visit; the name of the pass holder submitting the request; the date of the request.
 - b. Once a visit takes place, WAVES Records are typically updated electronically with information showing the actual time and place of the visitor's entry into and exit from the White House Complex.
5. "ACR Records" consist of records generated when a White House pass holder, worker, or visitor swipes his or her permanent or temporary pass over one of the electronic pass readers located at entrances to and exits from the White House Complex.

EXHIBIT

1

- a. ACR Records include the following information: the pass holder's name and badge number; the time and date of the swipe; and the post at which the swipe was recorded.
- 6. "Federal Records" mean documentary materials subject to the Federal Records Act (44 U.S.C. § 3301 et seq.).
- 7. "Presidential Records" mean documentary materials subject to the Presidential Records Act (44 U.S.C. § 2201 et seq.).
- 8. "The White House Complex" means the White House and the Eisenhower Executive Office Building, and the secured grounds encompassing them, and the New Executive Office Building.
- 9. The "White House Office of Records Management" ("WHORM") means the office in the White House responsible for preserving Presidential Records.

BACKGROUND

- 10. WHACS is operated by the Secret Service in order to control and monitor the entry and exit of persons into and out of the White House Complex.
- 11. The information contained in WHACS Records originates with White House pass holders, visitors, and workers as a result of White House business.
 - a. Such information reflects the conduct of the President's business by providing details about the comings and goings of staff, workers, and visitors to the White House.
- 12. The authorized White House pass holders provide information contained in WAVES Records to the Secret Service temporarily for two limited purposes:
 - a. To allow the Secret Service to perform background checks to determine whether, and under what conditions, to authorize the visitor's temporary admittance to the White House Complex;
 - b. To allow the Secret Service to verify the visitor's admissibility at the time of the visit.
- 13. Once the visit ends, the information contained in WAVES Records and ACR Records has no continuing usefulness to the Secret Service.
- 14. It has been the longstanding practice of the Secret Service to transfer WAVES Records on CD-ROM to WHORM every 30 to 60 days. Except as noted in paragraph 16 below, once the Secret Service transferred the WAVES Records, the Secret Service ensured that those records were erased from its computer system.

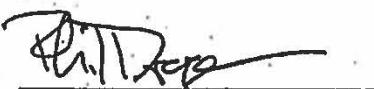
- a. Under this practice, the Secret Service has retained WAVES Records for completed visits for only a brief period, and solely for the purpose of facilitating an orderly and efficient transfer of those records to WHORM.
- 15. The Secret Service historically has retained ACR Records in its computer system without transferring those records to WHORM. In 2004, however, the Secret Service and the White House recognized and agreed that ACR Records should be treated in a manner consistent with the treatment of WAVES Records, and concluded that ACR Records should be transferred to WHORM and eliminated from the Secret Service's files. The Secret Service has continued to maintain ACR Records pending a legal determination of their status as Presidential Records.
- 16. In October 2004, at the request of the National Archives and Records Administration ("NARA"), the Secret Service began retaining its own copy of the WAVES Records that it transferred to the White House.
 - a. The Secret Service agreed to NARA's request on the understanding that it would be a temporary practice maintained until a legal determination was made confirming the propriety of handling WHACS Records as Presidential Records.

UNDERSTANDING AND AGREEMENT

- 17. The purpose of this Memorandum of Understanding is to express and embody The Parties' understanding and agreement that WHACS Records whenever created:
 - a. are at all times Presidential Records;
 - b. are not Federal Records; and
 - c. are not the records of an "agency" subject to the Freedom of Information Act (5 U.S.C. § 552).
- 18. The Parties understand and agree that all WHACS Records are at all times under the exclusive legal custody and control of the White House.
 - a. Although the Secret Service may at times have physical possession of WHACS Records, such temporary physical possession does not alter the legal status of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.
- 19. The Parties understand and agree that any information provided to the Secret Service for the creation, or in the form, of WHACS Records is provided under an express reservation of White House control.

20. The Parties understand and agree that the White House, but not the Secret Service, has a continuing interest in WHACS Records and that the White House continues to use the information contained in such records for various purposes. Specifically:
 - a. WAVES Records have historical and other informational value to the White House as evidence of who has been invited and/or granted admission to the White House to meet with the President or members of his staff.
 - b. ACR Records have historical or other informational value to the White House, as evidence of the comings and goings of staff, visitors, and workers at the White House Complex in the conduct of White House business.
21. The Parties understand and agree that, once a visitor's visit to the White House Complex is complete, the Secret Service has no continuing interest in preserving or retaining WAVES Records. The Parties also understand and agree that the Secret Service has no interest whatsoever in preserving or retaining ACR Records.
 - a. WHACS Records are therefore not appropriate for preservation by the Secret Service either as evidence of the Secret Service's activities or for their informational value.
22. The Secret Service understands and agrees that it will regularly transfer all WHACS Records in its possession to WHORM, and that it will not retain its own copies of any WHACS Records except as is necessary to facilitate the transfer of those records to WHORM.
 - a. Any temporary retention of WHACS Records by the Secret Service after the visit, entrance, or exit memorialized by those records is solely for the purpose of facilitating an orderly and efficient transfer of those records, and does not operate in any way to divest the White House of complete and exclusive legal control.
23. The understandings and agreements expressed herein apply to:
 - a. Any and all WHACS Records currently in the possession or custody of the Secret Service;
 - b. Any and all WHACS Records that may be generated at any time subsequent to the execution of this Memorandum of Understanding.
24. It is specifically intended by The Parties that the understandings and agreements set forth herein serve as evidence that the White House at all times asserts, and the Secret Service disclaims, all legal control over any and all WHACS Records subject to this Memorandum of Understanding.

a. The foregoing is not intended, and should not be construed, to suggest that WHACS Records in the possession or custody of the Secret Service before the execution of this Memorandum of Understanding were under the legal control of the Secret Service.



Director, White House Office
of Records Management



Chief Records Officer,
United States Secret Service

Dated: 5-17, 2006

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE, et al.,)
Plaintiffs,) Civ. Action No. 17-2542 (KPF)
v.)
U.S. DEPARTMENT OF HOMELAND SECURITY,)
EXECUTIVE OFFICE OF THE PRESIDENT,)
Defendants.

DECLARATION OF SUPERVISORY INFORMATION TECHNOLOGY SPECIALIST
WILLIAM WILLSON, UNITED STATES SECRET SERVICE

I, William Willson, make the following declaration in lieu of affidavit pursuant to 28 U.S.C.

§1746:

1. I am employed by the United States Secret Service (“Secret Service” or “Agency”) as the Branch Chief for Mission Applications within the Office of the Chief Information Officer of the United States Secret Service. I have a Bachelor of Science Degree in Information Systems Management and a Master’s Degree in Business Administration and Technology Management.
2. I joined the Secret Service in May of 2008 as an Information Technology Specialist and was immediately assigned to redesign a replacement for the Worker and Visitor Entrance

System (WAVES). In this capacity, I was tasked with designing, developing and deploying a new version of this system.

3. In my capacity as the Branch Chief for Mission Applications, I manage the WAVES system and am familiar with the information that is obtainable from the WAVES System.
4. It is my understanding that the time frame at issue in the above-captioned case is January 20, 2017, through March 8, 2017.

Post-Visit Status of WAVES/ACR Records

5. The Secret Service electronically transfers WAVES and ACR (Access Control Records) records to the WHORM (White House Office of Records Management) approximately every 30 days. I typically send an e-mail to the WHORM with the prior month's data around the beginning of the next month.
6. Records that are older than 60 days are ordinarily auto-deleted from the server operated by the Secret Service on a rolling basis. For example, on March 31, 2017, data from January 30, 2017 was auto-deleted from the server operated by the Secret Service.
7. An individual WAVES record contains the following fields:

NameLast	Last Name of Visitor
NameFirst	First Name of Visitor
NameMid	Middle Name of Visitor
DOB	Date of Birth of Visitor
SSN	Social Security Number of Visitor
UIN	Unique Identification Number
BDGNBR	Badge Number
Access_Type	Type of Appointment (i.e., visitor, worker)
TOA	Time of Arrival
POA	Place of Arrival (Turnstile)
TOD	Time of Departure
POD	Point of Departure
Appt_Made_Date	Date Appointment was made
Appt_Start_Date	Date Appointment starts
Appt_End_Date	Date Appointment ends

Appt_Cancel_Date	Date Appointment cancelled
Total_People	Number of people in the Appointment
Escort_Type	Type of Escort Required
Escort_Name_Last	Last Name of Escort
Escort_Name_F	First Name of Escort
Last_UpdatedBy	Person who last updated the record
Post	Area of turnstile location at arrival
LastEntryDate	Date of last change to the record
Terminal_Suffix	Identification of the computer at the post
Visitee_NameLast	Last Name of Visitee
Visitee_NameFirst	First Name of Visitee
Visitee_Phone	Phone Number of Visitee
Meeting_LOC	Meeting Location
Meeting_Room	Meeting Room Number
Caller_Name_Last	Last Name of the Person Making the Appointment
Caller_Name_First	First Name of the Person Making the Appointment
Caller_Phone	Phone Number of Person Making the Appointment
Caller_Room	Room Number of Person Making the Appointment
Note	Security Status Code
Description	Details regarding security or nature of event
AppointmentComments	Field used by the appointment requestor to pass information to Secret Service WAVES Center personnel about the appointment
HighlySensitiveMeeting	Notation by the requestor if it is a highly sensitive meeting
Caller_Email	Email address of the appointment requestor

PRA versus FOIA Components

8. It is my understanding that the United States Court of Appeals for the District of Columbia Circuit has determined that records that would disclose visitors to units in the Executive Office of the President whose sole function is to advise and assist the President (“PRA Components”) are Presidential records not subject to the FOIA. The Court also concluded that records that would disclose visitors to offices in the White House Complex that historically have been covered by the Freedom of Information Act are “agency records” subject to disclosure under the Act (“FOIA Components”).

9. From the information contained in the fields specified above, the Secret Service has no definitive method to ascertain whether the visitee is employed by a PRA Component or a FOIA Component. There is no field in the WAVES system that indicates what office the visitee is employed by, although the requestor's e-mail address in the Caller_Email field would reflect the component of the requestor. However, the visitee and the requestor may be different individuals from different components. As one example, only some individuals are authorized to make appointment requests, so a particular visitee may not have that authorization, and may request that an authorized passholder from another component submit the request.
10. In addition, there is no field to indicate the attendees at a meeting. So, a meeting can include attendees from FOIA components, PRA components, or some combination of the two. An employee of one of the FOIA components may request an appointment for a meeting that is attended by employees of PRA components as well.
11. The meeting location would also not provide definitive results as both the PRA Components and the FOIA Components utilize both the Eisenhower Executive Office Building (EEOB) and the New Executive Office Building (NEOB).
12. The description field is a "free form" field that allows users to make remarks regarding issues such as security arrangements regarding the visitor or the type of event the visitor is attending. These remarks, however, do not identify whether the event is sponsored by a PRA Component or a FOIA Component.
13. For all of 2017 and to the present, for the above-stated reasons, the Secret Service would have no definitive ability to discern from the WAVES records whether a visitor is making

a visit to an individual that was employed by a PRA Component or to an individual that was employed by a FOIA Component.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

10/23/17
Date


William Willson
Branch Chief, Mission Applications
United States Secret Service

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE, NATIONAL SECURITY ARCHIVE,
CITIZENS FOR RESPONSIBILITY AND ETHICS IN
WASHINGTON, KNIGHT FIRST AMENDMENT
INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiffs,

No. 17 Civ. 2542 (KPF)

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,
EXECUTIVE OFFICE OF THE PRESIDENT,

Defendants.

DECLARATION OF PHILIP C. DROEGE

I, Philip C. Droege, hereby declare as follows:

1. I am the Director of the White House Office of Records Management (“WHORM”). In this capacity, I am responsible for managing, preserving, and forwarding to the National Archives and Records Administration (“NARA”) at the appropriate time records reflecting the business of the Presidency and Vice Presidency in accordance with the Presidential Records Act. I have held this position since July 2004, and have been an employee of the White House Office since July 1990. The statements made herein are based on my personal knowledge and on information made available to me in my official capacity.

The White House and Presidential Records

2. The United States Secret Service (Secret Service) provides security for,

monitors, and controls access to the White House Complex, which includes the White House, the Eisenhower Executive Office Building (“EEOB”), the grounds encompassing the EEOB and the White House, and the New Executive Office Building (“NEOB”). The White House Complex includes office space for the President and his closest advisors and staff in the White House Office, as well as office space for the Vice President and his closest advisors and staff in the Office of the Vice President.

3. Since at least 1990, throughout the last five Presidential administrations, it has been the policy and practice of the White House Office, in accordance with the Presidential Records Act, 44 U.S.C. § 2201 *et seq.*, to retain and maintain control over records generated by the Worker and Visitor Entrance System (“WAVES”).

Treatment of WAVES/ACR Records

4. Since at least 2001, it has been the practice of the Secret Service to transfer newly-generated WAVES records to the WHORM, generally every 30 to 60 days. In recent years, the transfer of records has occurred approximately every 30 days. (The note and description fields from prior to 2006 were not initially transferred to the WHORM; those fields from 2004 to 2006 were subsequently transferred to the WHORM in 2006.)

5. At least as early as 2001 (at the end of the Clinton Administration), and upon revisiting the issue in 2004, the Secret Service and the White House recognized and agreed that Access Control Records (ACR) records should be treated in a manner generally consistent with WAVES records. Since at least 2006, the Secret Service has been transferring ACR records to the WHORM, generally every 30 to 60 days (and more recently approximately every 30 days), similar to the transfer of WAVES records.

6. In May 2006, the WHORM entered into a Memorandum of Understanding with the Secret Service Records Management Program (“2006 MOU”) that documented what was then understood to be past practice and interests regarding WAVES and ACR records (which at that time were collectively termed White House Access Control System, or WHACS, records). The 2006 MOU confirmed the Secret Service’s historical practice of transferring WAVES records to the WHORM within 30 to 60 days after the visit (and then deleting those records from its systems), as well as the WHORM’s management and custody of those records under the Presidential Records Act.

7. The 2006 MOU expressly acknowledged that the “White House, but not the Secret Service, has a continuing interest in [WAVES and ACR] Records” 2006 MOU at ¶ 20. Such records reflect the activities and official functions of the Presidency and Vice Presidency, and the White House continues to use the information contained in such records for various historical and informational purposes. Accordingly, WAVES and ACR records, like other records that reflect the activities of the Presidency and Vice Presidency, are maintained as records subject to the Presidential Records Act.

8. The 2006 MOU continues to reflect current practices and interests with respect to WAVES and ACR records.

9. By contrast, “[o]nce the visit ends, the information contained in WAVES Records and ACR Records has no continuing usefulness to the Secret Service.” 2006 MOU at ¶ 13. The Secret Service’s temporary retention of such records after an individual’s visit to the White House Complex is solely for the purpose of facilitating an orderly and efficient transfer

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of the records to the WHORM. 2006 MOU at ¶ 14(a).

10. At the conclusion of each Presidential Administration, it is the practice of the WHORM to transfer to NARA all WAVES and ACR records the WHORM has received during the course of that Administration.

11. I understand that Plaintiffs in this case have sought WAVES and ACR records for the period January 20 through March 8, 2017. Pursuant to long-established practice, as reflected in the 2006 MOU, those records were transferred by the Secret Service to the WHORM on the routine 30 day basis. The WHORM will continue to maintain and preserve the records under the Presidential Records Act, and the records will be transferred to NARA at the conclusion of the current Administration. However, the WHORM has assured the Secret Service that, should there be a final judgment in favor of Plaintiffs in this matter (including any appeal), WHORM will provide the Secret Service with the records necessary to satisfy the judgment.

The Former Voluntary Disclosure Policy

12. In 2009, the White House adopted a policy of voluntarily disclosing certain information contained in a subset of WAVES and ACR records, starting on September 15, 2009.

13. The voluntary disclosure policy was subject to exceptions for: (1) information that implicated personal privacy or law enforcement concerns (e.g., dates of birth, social security numbers, and contact phone numbers); (2) records that implicated the personal safety of EOP staff (their daily arrival and departure); (3) records whose release would threaten national security interests; (4) records related to purely personal guests of the first and second

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families (i.e., visits that do not involve any official or political business); and (5) records related to a small group of particularly sensitive meetings (e.g., visits of potential Supreme Court nominees). Records and information falling within these categories were not made public or, in the case of particularly sensitive meetings, were made public only after the records were no longer sensitive.

14. The policy of voluntary disclosure was rescinded on April 14, 2017, and is no longer in effect.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 23, 2017.



PHILIP C. DROEGE, DIRECTOR
White House Office of
Records Management

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE, NATIONAL SECURITY ARCHIVE,
CITIZENS FOR RESPONSIBILITY AND ETHICS IN
WASHINGTON, KNIGHT FIRST AMENDMENT
INSTITUTE AT COLUMBIA UNIVERSITY,

Plaintiffs,

No. 17 Civ. 2542 (KPF)

v.

U.S. DEPARTMENT OF HOMELAND SECURITY,
EXECUTIVE OFFICE OF THE PRESIDENT,

Defendants.

DECLARATION OF CHARLES CHRISTOPHER HERNDON

I, Charles C. Herndon, declare as follows:

1. I am the Director of White House Information Technology (“DWHIT”) and Deputy Assistant to the President. I am the senior officer responsible for the information resources and information systems provided to the President, Vice President and Executive Office of the President. I report to White House Deputy Chief of Staff and Assistant to the President for Operations, and through him to the Chief of Staff and the President. I am part of what is known as the White House Office. This declaration is based on my personal knowledge and upon information provided to me in my official capacity.

2. A number of components make up the Executive Office of the President, including the White House Office (also referred to as the Office of the President). Components of the White House Office include the President’s immediate staff, the White House Counsel’s Office and the Staff Secretary’s Office. The White House Office serves the President in the performance of the many detailed activities incident to his immediate office, and the various

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Assistants and Deputy Assistants to the President who aid the President in such matters as he may direct. My role is to ensure the effective use of information resources and systems to the President.

3. On March 19, 2015, President Obama issued a memorandum creating my position, and establishing a Presidential Information Technology Community and an Executive Committee for Presidential Information Technology, of which I am a member. A true and correct copy of this memorandum is attached hereto at Exhibit A.

4. As set forth in the Memorandum, the purpose of creating a Presidential Information Technology Community was to “ensure that information resources and information systems provided to the President, Vice President, and EOP [Executive Office of the President] are efficient, secure, and resilient; establish a model for Government information technology management efforts; reduce operating costs through the elimination of duplication and overlapping services; and accomplish the goal of converging disparate information resources and information systems for the EOP.” Exh. A, Section 1. In particular, it was determined that bringing various systems and resources into a single community under the auspices of the DWHIT would enhance the security of those systems and resources.

5. The Presidential Memorandum instructs that members of the Presidential Information Technology Community enter into any memoranda of understanding as necessary to give effect to the Presidential Memorandum. Accordingly, in September 2015, the Community members entered into a Memorandum of Understanding (MOU) governing its operations. A true and correct copy of that MOU is appended hereto at Exhibit B.

6. The MOU establishes a framework to enable the DWHIT and the Executive Committee of the Presidential Information Technology Community to implement the necessary policies and procedures for operating and maintaining the information resources and information

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systems provided to the President, Vice President, and EOP. Exh. B at 1 ¶ 5. It does this by, among other things, identifying the respective roles and responsibilities of the White House Communications Agency, the Office of Administration, the National Security Council, and the U.S. Secret Service (USSS), Exh. B § 2.

7. With regard to the USSS, the MOU states that the USSS shall provide, without limitation, all services which are not otherwise agreed to be provided by any other Party to the MOU, and which USSS employees and agents require in order to perform USSS's protective functions as required by law. Exh. B § 2.08. Among the services provided by the USSS pursuant to the MOU is the management and operation of the Executive Facilities Access Control System (EFACS) and Worker and Visitor Entrance System (WAVES). USSS employees and agents require access to both of these information systems in order to perform the USSS's protective functions with regard to the White House Complex.

8. In accordance with the MOU, although the USSS operates EFACS and WAVES, including by housing and operating the WAVES servers, it does so on behalf of the President. The President, through the DWHIT, controls and is the business owner of the EFACS and WAVES systems, and the USSS operates those systems as a service provider. In that capacity, the USSS cannot make changes to the systems, or make purchases related to the systems, without consent of the DWHIT.

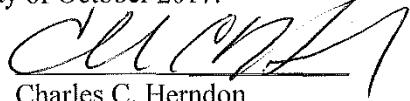
9. Notwithstanding the USSS's operation of EFACS and WAVES on behalf of the President, the USSS does not maintain ownership, control, or custody of the records generated by the EFACS and WAVES systems. The USSS has limited access to EFACS and WAVES records as necessary to perform its protective functions; however, once a visit is concluded, the USSS may not access EFACS or WAVES records without White House approval. As set forth in the MOU, "[a]ll records created, stored, used, or transmitted by, on, or through the

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unclassified information systems and information resources provided to the President, Vice President, and EOP”—including EFACS and WAVES records—“remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component.” Exh. B § 3.01.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 23rd day of October 2017.



Charles C. Herndon



Administration of Barack Obama, 2015

Memorandum on Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology

March 19, 2015

Memorandum for the Secretary of Defense, the Secretary of Homeland Security, the Director of the Office of Management and Budget, the National Security Advisor, and the Director of the Office of Administration

Subject: Establishing the Director of White House Information Technology and the Executive Committee for Presidential Information Technology

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve the information resources and information systems provided to the President, Vice President, and Executive Office of the President (EOP), I hereby direct the following:

Section 1. Policy. The purposes of this memorandum are to ensure that the information resources and information systems provided to the President, Vice President, and EOP are efficient, secure, and resilient; establish a model for Government information technology management efforts; reduce operating costs through the elimination of duplication and overlapping services; and accomplish the goal of converging disparate information resources and information systems for the EOP.

This memorandum is intended to maintain the President's exclusive control of the information resources and information systems provided to the President, Vice President, and EOP. High-quality, efficient, interoperable, and safe information systems and information resources are required in order for the President to discharge the duties of his office with the support of those who advise and assist him, and with the additional assistance of all EOP components. The responsibilities that this memorandum vests in the Director of White House Information Technology, as described below, have been performed historically within the EOP, and it is the intent of this memorandum to continue this practice.

The Director of White House Information Technology, on behalf of the President, shall have the primary authority to establish and coordinate the necessary policies and procedures for operating and maintaining the information resources and information systems provided to the President, Vice President, and EOP. Nothing in this memorandum may be construed to delegate the ownership, or any rights associated with ownership, of any information resources or information systems, nor of any record, to any entity outside of the EOP.

Sec. 2. Director of White House Information Technology. (a) There is hereby established the Director of White House Information Technology (Director). The Director shall be the senior officer responsible for the information resources and information systems provided to the President, Vice President, and EOP by the Presidential Information Technology Community (Community). The Director shall:

- (i) be designated by the President;
- (ii) have the rank and status of a commissioned officer in the White House Office; and

(iii) have sufficient seniority, education, training, and expertise to provide the necessary advice, coordination, and guidance to the Community.

(b) The Deputy Chief of Staff for Operations shall provide the Director with necessary direction and supervision.

(c) The Director shall ensure the effective use of information resources and information systems provided to the President, Vice President, and EOP in order to improve mission performance, and shall have the appropriate authority to promulgate all necessary procedures and rules governing these resources and systems. The Director shall provide policy coordination and guidance for, and periodically review, all activities relating to the information resources and information systems provided to the President, Vice President, and EOP by the Community, including expenditures for, and procurement of, information resources and information systems by the Community. Such activities shall be subject to the Director's coordination, guidance, and review in order to ensure consistency with the Director's strategy and to strengthen the quality of the Community's decisions through integrated analysis, planning, budgeting, and evaluation processes.

(d) The Director may advise and confer with appropriate executive departments and agencies, individuals, and other entities as necessary to perform the Director's duties under this memorandum.

Sec. 3. Executive Committee for Presidential Information Technology. There is hereby established an Executive Committee for Presidential Information Technology (Committee). The Committee consists of the following officials or their designees: the Assistant to the President for Management and Administration; the Executive Secretary of the National Security Council; the Director of the Office of Administration; the Director of the United States Secret Service; and the Director of the White House Military Office.

Sec. 4. Administration. (a) The President or the Deputy Chief of Staff for Operations may assign the Director and the Committee any additional functions necessary to advance the mission set forth in this memorandum.

(b) The Committee shall advise and make policy recommendations to the Deputy Chief of Staff for Operations and the Director with respect to operational and procurement decisions necessary to achieve secure, seamless, reliable, and integrated information resources and information systems for the President, Vice President, and EOP. The Director shall update the Committee on both strategy and execution, as requested, including collaboration efforts with the Federal Chief Information Officer, with other government agencies, and by participating in the Chief Information Officers Council.

(c) The Secretary of Defense shall designate or appoint a White House Technology Liaison for the White House Communications Agency and the Secretary of Homeland Security shall designate or appoint a White House Technology Liaison for the United States Secret Service. Any entity that becomes a part of the Community after the issuance of this memorandum shall designate or appoint a White House Technology Liaison for that entity. The designation or appointment of a White House Technology Liaison is subject to the review of, and shall be made in consultation with, the President or his designee. The Chief Information Officer of the Office of Administration and the Chief Information Officer of the National Security Council, and their successors in function, are designated as White House Technology Liaisons for their respective components. In coordination with the Director, the White House Technology Liaisons shall ensure that the day-to-day operation of and long-term

strategy for information resources and information systems provided to the President, Vice President, and EOP are interoperable and effectively function as a single, modern, and high-quality enterprise that reduces duplication, inefficiency, and waste.

(d) The President or his designee shall retain the authority to specify the application of operating policies and procedures, including security measures, which are used in the construction, operation, and maintenance of any information resources or information system provided to the President, Vice President, and EOP.

(e) Presidential Information Technology Community entities shall:

(i) assist and provide information to the Deputy Chief of Staff for Operations and the Director, consistent with applicable law, as may be necessary to implement this memorandum; and

(ii) as soon as practicable after the issuance of this memorandum, enter into any memoranda of understanding as necessary to give effect to the provisions of this memorandum.

(f) As soon as practicable after the issuance of this memorandum, EOP components shall take all necessary steps, either individually or collectively, to ensure the proper creation, storage, and transmission of EOP information on any information systems and information resources provided to the President, Vice President, and EOP.

Sec. 5. Definitions. As used in this memorandum:

(a) "Information resources," "information systems," and "information technology" have the meanings assigned by section 3502 of title 44, United States Code.

(b) "Presidential Information Technology Community" means the entities that provide information resources and information systems to the President, Vice President, and EOP, including:

- (i) the National Security Council;
- (ii) the Office of Administration;
- (iii) the United States Secret Service;
- (iv) the White House Military Office; and
- (v) the White House Communications Agency.

(c) "Executive Office of the President" means:

- (i) each component of the EOP as is or may hereafter be established;
- (ii) any successor in function to an EOP component that has been abolished and of which the function is retained in the EOP; and
- (iii) the President's Commission on White House Fellowships, the President's Intelligence Advisory Board, the Residence of the Vice President, and such other entities as the President from time to time may determine.

Sec. 6. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

- (i) the authority granted by law to an executive department, agency, entity, office, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and appropriate protections for privacy and civil liberties, and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

BARACK OBAMA

Categories: Communications to Federal Agencies : White House Information Technology, Director, memorandum establishing; Executive Committee for Presidential Information Technology, memorandum establishing.

Subjects: White House Office : Assistants to the President :: White House Information Technology, Director; White House Office : Information Technology, Executive Committee for Presidential.

DCPD Number: DCPD201500185.

Memorandum of Understanding

Entered into by the

Presidential Information Technology Community

Regarding

Presidential Information Technology Community Operations

This Memorandum of Understanding (Memorandum) is effective as of the date of the last agreeing entity to sign the Memorandum.

Recitals:

1. On March 19, 2015, the President signed a Presidential Memorandum establishing the Director of White House Information Technology (DWHIT) and the Executive Committee for Presidential Information Technology (Committee), and designating several entities as members of the Presidential Information Technology Community (Community). The Presidential Memorandum requires Community entities to “enter into any memoranda of understanding as necessary to give effect” to the Presidential Memorandum.
2. This Memorandum is entered into by all Community entities as defined in the Presidential Memorandum, and collectively referred to as “Parties.”
3. This Memorandum establishes a framework to enable the DWHIT and the Committee to implement the necessary policies and procedures for operating and maintaining the information resources and information systems provided to the President, Vice President, and Executive Office of the President (EOP).
4. Each Party enters into this Memorandum under that Party’s authority to provide information resources and information systems to the President, Vice President, and EOP.
5. This Memorandum incorporates all principles and directives that are set forth in the Presidential Memorandum. This Memorandum shall in all instances be interpreted to give full force and effect to the President’s and the DWHIT’s respective authorities to set policies and procedures for the services that are provided as described and agreed upon below.

The Parties agree as follows:

*Memorandum of Understanding Entered into by
Presidential Information Technology Community Entities*

Page 1 of 9

§ 1 Joint Program Office; Joint Operations Teams

- 1.01 The Parties establish a Joint Program Office to provide expert and administrative support for the performance of responsibilities under the Presidential Memorandum by the DWHIT, the Committee, the White House Technology Liaisons, and the Parties.
- 1.02 The Joint Program Office consists of those employees and agents of each Party who are assigned by that Party to the Joint Program Office at the DWHIT's request. Unless the Parties agree otherwise, not more than 20 individuals may be assigned to the Joint Program Office at any time. Section 7 of this Memorandum notwithstanding, the Parties may agree to increase or decrease the maximum number of individuals who may be assigned to the Joint Program Office in any manner and by any medium reasonable in the circumstances. As used in this subsection, the term "employees" includes detailees.
- 1.03 An individual who is assigned to the Joint Program Office works for the benefit of, and is performing the work of, the individual's employing authority.
- 1.04 The Joint Program Office is under the DWHIT's operational supervision. Through the Joint Program Office, the DWHIT:
 - (1) coordinates mission and support programs in a manner that promotes the day-to-day operation and availability of the information resources and information systems provided to the President, Vice President, and EOP;
 - (2) prioritizes work, develops technology and policies, and aligns procurement and budgetary goals among the Parties;
 - (3) coordinates the implementation of requirements that are approved by the DWHIT; and
 - (4) provides the Deputy Chief of Staff for Operations and the Committee with the support necessary to review, evaluate, and approve plans and requirements.
- 1.05 The DWHIT may, when appropriate and lawful, coordinate the efforts of the Joint Program Office with non-Community entities.
- 1.06 As necessary to execute their responsibilities under law and the Presidential Memorandum, and to carry out activities in accordance with policy coordination and guidance by the DWHIT, the Parties agree to establish any necessary Joint Operations Teams. Section 7 of this Memorandum notwithstanding, the Parties may establish or disestablish Joint Operations Teams and specify the maximum number of individuals that may be assigned to a Joint Operations Team in any manner and by any medium reasonable in the circumstances. An individual who is assigned to a Joint Operations Team works for the benefit of, and is performing the work of, his or her employing authority.

1.07 The Parties acknowledge that the DWHIT may promulgate all necessary procedures and rules governing the information resources and information systems provided by each Party to the President, Vice President, and EOP. Each Party agrees that, consistent with organization mission and the Presidential Memorandum, it will implement the procedures and rules as specified by the DWHIT, to the extent permitted by law.

§ 2 Lead Activity and Executive Agent Designations

2.01 The White House Communications Agency (WHCA) shall provide, without limitation, the following services:

- (1) the acquisition, installation, operation, and accreditation of unclassified information technology infrastructure; and
- (2) core services related to the unclassified information technology infrastructure.

2.02 WHCA shall serve as the Parties' executive agent to perform the duties and functions necessary to discharge WHCA's responsibility as lead agency under Section 2.01, including the authority to issue policies and procedures related to the discharge of its responsibilities.

2.03 As used in Subsection 2.01:

- (1) "information technology infrastructure" includes the unclassified internal information technology plant infrastructure for all EOP and White House Military Office (WHMO) buildings, including copper and fiber backbones, LAN (routers and switches), WAN (SONET and transport circuits), and supporting power components. The term does not include the existing United States Secret Service (USSS) copper and fiber plant used in support of stand-alone security systems.
- (2) "core services" includes services necessary to access and use the information technology infrastructure, including virtualized computing and storage infrastructure, directory services, support services, messaging, telephony, video conferencing, and the end-user devices required to access the services including laptops and desktops, wireless and wired phones, printers and scanners, and networked multi-function copiers.

2.04 The Office of Administration (OA) shall provide, without limitation, the following services:

- (1) the acquisition, development, deployment, and support of business productivity applications to serve the President, Vice President, and EOP and support the operations of the Parties under the Presidential Memorandum.

- (2) records management services, including maintenance of records created, stored, used, or transmitted by, on, or through the information resources and information systems provided to the President, Vice President, and EOP subject to the terms and conditions in Section 3.

2.05 OA shall serve as the Parties' executive agent to perform the duties and functions necessary to discharge OA's responsibility as lead agency under Section 2.04, including the authority to issue policies and procedures related to the discharge of its responsibilities.

2.06 The National Security Council (NSC) shall provide, without limitation, the following services:

- (1) all services related to the operation and maintenance of those systems commonly known as "T-Net," "S-Net," "CMS," and "EOP VoSIP" as of the effective date of this Memorandum, in order to ensure usage of and access to such systems by the Parties' authorized personnel.
- (2) other services provided as of the effective date of this Memorandum that are related to communications with heads of state, heads of government, and other representatives of foreign governments.

2.07 NSC shall serve as the Parties' executive agent to perform the duties and functions necessary to discharge NSC's responsibility as lead agency under Section 2.06, including the authority to issue policies and procedures related to the discharge of its responsibilities.

2.08 USSS shall provide, without limitation, all services which are not otherwise agreed to be provided by any other Party, and which USSS employees and agents require in order to perform USSS's protective functions as required by law.

2.09 USSS shall serve as the Parties' executive agent to perform the duties and functions necessary to discharge USSS's responsibility as lead agency under Section 2.08, including the authority to issue policies and procedures related to the discharge of its responsibilities.

2.10 Each Party will continue to independently maintain or operate any information resources or information systems which that Party maintains or operates for internal purposes, or to fulfill independent responsibilities imposed by law. Such maintenance and operation will remain unaffected by this Memorandum unless otherwise agreed to by the Parties or directed by competent authority.

2.11 (1) Each Party agrees to give reasonable notice to the other Parties and the DWHIT of any proposed acquisition by that Party of information resources or information systems. The notice must, at a minimum, include the nature and amount of expenditures for, and the acquisition method of, the information resources or information systems to be acquired.

- (2) Notice is considered reasonable if it is delivered to each Party's point of contact designated in Section 6 and the DWHIT not later than the 60th day before the date of the proposed acquisition.
- (3) This subsection does not apply to:
 - (A) acquisitions related to those information resources or information systems subject to Section 2.10 and for which the total expenditure does not exceed the simplified acquisition threshold established by 41 USC 134 and adjusted by the Federal Acquisition Regulatory Council from time to time under 41 USC 1908; or
 - (B) USSS's acquisition of information resources or information systems in furtherance of its criminal investigative duties as set out in 18 U.S.C. §§ 1029-1030 and 3056.
- (4) The Parties agree that a Party may exempt from the notice requirements of this section any acquisition that is related to a special access program that is operated by, or on behalf of, that Party. For any acquisition by WHCA, the WHMO Director may make the exemption.

§ 3 Unclassified EOP Records

- 3.01 All records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component. Such records are hereinafter referred to as "EOP records."
- 3.02 WHCA employees and agents shall not, and are not authorized to, access the content of EOP records except in accordance with paragraphs 1 and 2 of this subsection. The DWHIT shall establish a process such that EOP records shall be maintained in a way that prohibits WHCA employees and agents from acquiring physical or electronic access to the content of EOP records. WHCA employees and agents who are providing services under this Memorandum may have access to metadata that is associated with EOP records only as necessary to perform security or other technical activities in conjunction with the provision of services under this Memorandum.
 - (1) Not more than 10 employees or agents of WHCA at any given time may have permission to access the content of EOP records for the sole purpose of performing security or other technical activities. Section 7 of this Memorandum notwithstanding, the Parties may agree to increase or decrease the maximum number of such individuals in any manner and by any medium reasonable in the circumstances.
 - (2) Before any WHCA employee or agent may access the content of an EOP record pursuant to paragraph (1), approval must be provided by the DWHIT

or the DWHIT's designee in accordance with operating procedures that will be agreed upon by WHCA and OA. Approval shall be given only in the event of exigent circumstances that make such access necessary.

- 3.03 In accordance with policies and procedures issued by the DWHIT, the DWHIT shall ensure that audits are conducted to ensure compliance with subsection 3.02.
- 3.04 WHCA must not take any steps to integrate EOP records into its own systems or files. WHCA shall maintain EOP records in a manner that separates them from WHCA's own agency records, as well as any other non-EOP records that utilize the same infrastructure or core services as WHCA records. WHCA shall not disseminate, modify, dispose of, or archive any EOP records. OA shall archive EOP records in conjunction with the originating EOP component. No EOP records shall be stored, controlled, sent, shared, or received other than in accordance with the policies and procedures of the OA.
- 3.05 If WHCA receives a request, demand, or order for EOP records, or to which EOP records would be responsive, WHCA shall not provide EOP records in response and shall instead refer the matter to the EOP.

§ 4 Funds and Personnel

- 4.01 Nothing in this Memorandum affects each Party's responsibility for the costs of its personnel, including pay, benefits, and support, nor its responsibility for supervision and management of its personnel.
- 4.02 This Memorandum does not document or provide for the exchange of funds between the Parties. Similarly, it does not make any commitment of funds or resources.
- 4.03 Any alterations to the arrangement described in subsection 4.01 will be accomplished by separate instrument(s).

§ 5 Other Provisions

- 5.01 Nothing in this Memorandum restricts a Party's ability to enter into separate agreements with other Parties to fulfill the intent of the Presidential Memorandum or to fulfill responsibilities imposed on a Party by law. If a separate agreement may affect another Party's ability to discharge that Party's responsibilities imposed by this Memorandum or by law, the separately agreeing Parties will disclose the separate agreements as soon as practicable to the affected Parties.
- 5.02 Unless otherwise prohibited by law, a Party may, in consultation with the DWHIT and subject to the recipient's White House Technology Liaison's acceptance, assign any agreement, right, or responsibility to another Party as necessary to permit each Party to perform its responsibilities under this Memorandum and without the need for an amendment to the Memorandum or for a separate

memorandum. Each Party authorizes its White House Technology Liaison to make and accept assignments under this provision.

- 5.03 Each Party acknowledges that it may need certain levels of expertise to discharge its responsibilities under the Presidential Memorandum or this Memorandum that may not be available to that Party through its own employees and agents and that a Party may need to obtain that expertise through separate agreements or interagency orders.
- 5.04 Unless otherwise prohibited by law, each Party authorizes the DHWIT, after consultation with that Party's White House Technology Liaison, to act as that Party's non-exclusive agent for identifying and setting a requirement for the provision of services described in this Memorandum.

§ 6 Points of Contact

- 6.01 The White House Technology Liaison for each Party serves as that Party's point of contact for communicating with the other Parties and the DHWIT to implement this Memorandum. The White House Technology Liaison for WHCA serves as the point of contact for WHMO.

§ 7 Complete Agreement; Amendment

- 7.01 This Memorandum represents the complete agreement between the Parties regarding the Memorandum's subject matter.
- 7.02 An amendment to this Memorandum is effective only if the amendment is in writing and signed by the Parties.

§ 8 Transferability

- 8.01 This Memorandum is not transferable except with the written consent of the Parties.

§ 9 Termination; Expiration Date

- 9.01 Subject to Subsection 9.02, a Party may terminate this Memorandum, for any reason or no reason, upon not less than 90 days' notice to all other Parties stating that Party's intention to terminate this Memorandum.
- 9.02 Each Party acknowledges that it is entering into this Memorandum in good faith and is justifiably relying upon representations made by the other Parties. This reliance has caused and will cause each Party to reorder its operations and modify its decision-making processes, including the modification, forbearance, or discontinuance of hiring actions, budget requests, acquisition and related expenditure decisions, and service provision to non-Parties. Before a Party may give notice of termination, the Parties must meet and confer concerning the proposed termination of this Memorandum. A termination is not effective until the Parties agree that:

- (1) the termination does not affect any prior obligation, project, or activity or any current or proposed action; and
- (2) each Party is again capable of performing that Party's respective missions and responsibilities to at least the same extent of that Party's capability and performance as of the effective date of this Memorandum.

9.03 This Memorandum expires on the ninth anniversary of the effective date. The Parties will review this Memorandum on the third and sixth anniversaries of the effective date.

For National Security Council:

Suzanne George

Digitally signed by Suzanne George
DN: dc=eop, dc=gov, cn=Suzanne George,
email=Suzanne_A_George@sc.eop.gov
Date: 2015.09.21 08:30:17 -04'00'

Suzanne A. George
Deputy Assistant to the President,
Executive Secretary, and Chief of Staff

Date: _____

For Office of Administration:



Digitally signed by Catherine Solomon
DN: dc=eop, dc=gov, cn=Catherine Solomon,
email=Catherine_G_Solomon@oa.eop.gov
Date: 2015.08.04 16:00:16 -04'00'

Catherine G. Solomon
Deputy Assistant to the President
and Director

Date: _____

For United States Secret Service:

George Mulligan

Digitally signed by George Mulligan
DN: cn=George Mulligan
Date: 2015.09.10 11:15:35 -04'00'

George D. Mulligan
Chief Operating Officer

Date: _____

For White House Military Office:


BYNUM.JAMES.STUART.1

Digitally signed by BYNUM.JAMES.STUART.1134494677
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USN,
cn=BYNUM.JAMES.STUART.1134494677
Date: 2015.09.04 16:48:11 -04'00'

James S. Bynum
Acting Director

Date: _____

For White House Communications Agency:

THOMAS.CLEOPHUS.JR

.1110036520

Digitally signed by THOMAS.CLEOPHUS.JR.1110036520
DN: c=US, o=U.S. Government, ou=DoD, ou=PKI, ou=USA,
cn=THOMAS.CLEOPHUS.JR.1110036520
Date: 2015.09.09 17:05:04 -04'00'

~~Donovan L. Routsis~~ Cleophus Thomas Jr.
Commander

Date: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE, et al.,)
Plaintiffs,)
v.) Civil No. 17-2542 (KPF)
U.S. DEPARTMENT OF HOMELAND)
SECURITY, et al.,)
Defendants.)

DECLARATION OF ANNE L. WEISMANN

I, Anne L. Weismann, declare as follows:

1. I am an attorney for Plaintiff Citizens for Responsibility and Ethics in Washington (“CREW”), and a member in good standing of the bar of the District of Columbia. I submit this declaration in support of the Plaintiffs’ reply brief.

2. Attached as Exhibit A is a true and correct copy of a letter from Vanessa Brinkmann to Anne L. Weismann dated July 7, 2017, together with pages of calendars from Attorney General Jeff Sessions.

3. Attached as Exhibit B is a true and correct copy of the Plaintiff CREW's Complaint in *Citizens for Responsibility and Ethics in Washington v. U.S. Department of Homeland Security*, No. 06-cv-00883 (D.D.C. May 10, 2016).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. 

Dated: December 4, 2017


Anne L. Weismann

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EXHIBIT A

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U.S. Department of Justice
Office of Information Policy
Suite 11050
1425 New York Avenue, NW
Washington, DC 20530-0001

Telephone: (202) 514-3642

July 7, 2017

Ms. Anne Weismann
Chief FOIA Counsel
CREW
455 Massachusetts Avenue, NW
Washington, DC 20001
aweismann@citizensforethics.org

Re: DOJ-2017-002728 (AG)
No. 1:17-cv-0599 (D.D.C.)

Dear Ms. Weismann:

This is our third response to your above-referenced Freedom of Information Act (FOIA) request and related lawsuit, dated and received in this Office on March 6, 2017 seeking: (1) “all records containing or reflecting advice and/or recommendations given to Attorney General Jeff Sessions by his staff regarding whether or not he should recuse himself from any matters involving the 2016 presidential campaign;” (2) “all calendars for Attorney General Sessions for the period February 27, 2017 through March 3, 2017;” and (3) “all documents effectuating the attorney general’s recusal within the Department of Justice.” This response is made on behalf of the Office of the Attorney General (OAG).

By letter dated June 30, 2017, we provided you with an interim response on certain material within the nine pages responsive to part (2) of your request, and advised you that we would respond to you again by July 7, 2017 on the remaining material within those pages, pursuant to the Joint Status Report filed on June 21, 2017 (See ECF No. 15). Please be advised that our review of the remaining material within the nine pages responsive to part (2) of your request is now complete. I have determined that this material is appropriate for release with excisions made pursuant to Exemptions 5 and 6 of the FOIA, 5 U.S.C. § 552(b)(5) and (b)(6), and copies are enclosed. Exemption 5 pertains to certain inter- and intra-agency communications protected by the attorney work-product, deliberative process, and/or presidential communications privileges. Exemption 6 pertains to information the release of which would constitute a clearly unwarranted invasion of the personal privacy of third parties.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2015) (amended 2016). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

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2

If you have any questions regarding this response, please contact Kathryn Davis of the Department's Civil Division, Federal Programs Branch, at (202) 616-8298.

Sincerely,



Vanessa R. Brinkmann
Senior Counsel

Enclosures

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February 27, 2017

Monday

7:30 AM - 7:30 AM	En Route to the AG's Office
8:20 AM - 8:45 AM	Senior Meeting -- AG's Office Location: AG's office POC: Jody Hunt Attendees: Jody Hunt, Dana Boente, Jim Crowell, Jesse Panuccio
8:45 AM - 9:15 AM	Leadership Meeting -- AG's Conference Room POC: Jody Hunt Attendees: Jody Hunt (OAG), Dana Boente (ODAG), Jim Crowell (ODAG), Jesse Panuccio (OASG), Sam Ramer (OLA), Peter Carr (OPA), Ryan Newman (OLP), Danielle Cutrona, Rachael Tucker, David Rybicki
9:30 AM - 10:15 AM	FBI Briefing -- JCC Location: JCC POC: Tashina Gauhar Attendees: OAG: Jody Hunt and Rachael Tucker, ODAG: Acting DAG Boente, James Crowell, Tashina Gauhar, NSD: Mary McCord, George Toscas, Stu Evans, Michael Mullaney
10:15 AM - 10:45 AM	Meeting with Attorney General Doug Peterson, Nebraska -- AG's Conference Room Location: AG's Conference room AG POC: Danielle Cutrona POC: Dave Lopez (b) (6) Attendees: AG Doug Peterson, Joshi Shassere, Chief of Staff (Nebraska AG), Dave Lopez, Asst Nebraska AG, Ryan Post, Asst Nebraska AG, Mike Murray, Jim Crowell, Dana Boente, Robert Patterson, Danielle Cutrona
11:00 AM - 11:15 AM	Phone Call Mexican Attorney General, Raul Cervantes Andrade -- AG's Office Location: AG's office POC: Rachael Tucker Participants: Rachael Tucker, Jody Hunt In MX AG's office: Raul Cervantes Andrade, (b) (6), Interpreter, (b) (6), Guillermo Fonseca MX AG will call Peggy to be connected
11:15 AM - 11:45 AM	FISA SIGNATURE TIME -- AG's Conference Room Location: OAG conference room Attendees: OAG: Jody & Rachel; ODAG: James Crowell & Tashina Gauhar; NSD: Stuart Evans, (b) (6), (b) (6), (b) (6), (b) (6), Dana Boente
11:45 AM - 12:30 PM	LUNCH/Desk Time -- AG's Office Location: AG's Office
12:30 PM - 12:45 PM	(b) (5) case discussion -- AG's Conference Room Location: AG's Conference Room POC: Rachael Tucker Attendees: Jody Hunt, Rachael Tucker, Ken Blanco, Dana Boente, James Crowell, Chad Readler and Bruce Swartz
12:45 PM - 12:45 PM	En Route to Executive Office Building
1:00 PM - 3:00 PM	FYI: Judge Neil Gorsuch, Supreme Court Nominee (No attendance required) -- OLP Conference Room
1:00 PM - 1:20 PM	Private Appointment -- Executive Office Building; First Floor, Room 87
1:30 PM - 3:00 PM	(b) (5) [REDACTED]

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February 27, 2017 Continued

Monday

3:00 PM - 3:15 PM **En Route to AG's Office**

3:15 PM - 3:30 PM (b) (5) (b) (5) [REDACTED]

4:30 PM - 4:45 PM **PRESS -- Press Room**
Location: Press Room, DOJ
POC: Jody Hunt

5:00 PM - 5:45 PM **Press Phone Call: Byron York (FOX News/Washington Times) -- AG's Office**
Location: AG's Office
POC: Peter Carr
Participants: Peter Carr

Phone Call with Justice Clarence Thomas -- AG's office

6:00 PM - 6:30 PM **Press Phone Call: Hugh Hewitt (Radio Show) -- AG's Office**
Location: AG's Office
POC: Peter Carr
Participants: Hugh Hewitt

February 28, 2017

Tuesday

7:30 AM - 7:30 AM **En Route to AG's Office**

8:20 AM - 8:45 AM **Senior Meeting -- AG's Office**
Location: AG's office
POC: Jody Hunt
Attendees: Jody Hunt, Dana Boente, Jim Crowell, Jesse Panuccio

8:30 AM - 8:30 AM **En Route to Ritz-Carlton** *Staff attending should assemble in the AG's office
Location: AG's office to Ritz-Carlton
Attendees: Sarah Flores and Danielle Tucker

9:00 AM - 10:00 AM National Association of Attorney Generals, Speaking Engagement -- The Ritz-Carlton Hotel :1150 22nd Street, NW

Location: The Ritz-Carlton Hotel :1150 22nd Street, NW [Plaza Ballroom]
POC: Noreen Cournoyer, Conference Planner (b) (6)
AG POCs: Danielle Cutrona and Sarah Flores
EVENT SCHEDULE
8:45: JBS will arrive at Ritz-Carlton and proceed to the hold room. 8:50: Sen. Luther Strange and NAAG officers will meet with JBS in hold room and take a photo. Attendees: Sen. Luther Strange; NAAG President George Jepsen (AG-CT); NAAG President Elect Derek Schmidt (AG-KS); NAAG Vice President Jeff Landry (AG-LA), NAAG
Immediate Past President Marty Jackley (AG-SD) 9:00: JBS will proceed to speech location 9:05: NAAG President Jepsen to introduce Sen. Strange 9:10: Sen. Strange to introduce JBS 9:15: JBS remarks 9:35: JBS concludes remarks 9:40: JBS departs

10:00 AM - 10:00 AM En Route to AG's Office

February 28, 2017 Continued

Tuesday

11:00 AM - 11:10 AM	SPEAKING ENGAGEMENT: Remarks/ Introduction of Documentary -- DOJ Conference Center (Room 7411) Location: DOJ Conference Center (Room 7411) AG POC: Mary Blanche Hankey POC: Richard Toscano AG Role: Introduction to film screening of "Too Important to Fail?" ATTENDEES: DOJ Employees Agenda: 11:00-11:10am Remarks and introduction to film by AG 11:10 AG departs and returns to his office for FISA Signature time
12:00 PM - 1:30 PM	Lunch/Desk Time -- AG's Office
1:30 PM - 1:45 PM	Discussion on national security issue -- AG's Office Location: AG's Office POC: Rachael Tucker
3:00 PM - 3:45 PM	Antitrust Briefing -- AG's Conference room Location: AG's Conference Room POC: Jesse Panuccio Attendees: Jody Hunt (OAG); David Rybicki; Jesse Panuccio; Bryson Bachman (Deputy Associate AG (detailee from ATR), OASG); Rachel Parker (Chief of Staff, OASG); Brent Snyder (Acting AAG, ATR); Patty Brink (Director, Civil Enforcement, ATR); Jody Hunt; Michael Murray
3:45 PM - 4:15 PM	FISA SIGNATURE TIME -- AG's Conference Room Location: OAG conference room Time: Daily at 11:00 am Attendees: Jody and Rachel, James Crowell, Tashina Gauhar, Stuart Evans, (b) (6) [REDACTED], (b) (6) [REDACTED], (b) (6) [REDACTED]
4:15 PM - 5:15 PM	Budget Meeting -- AG's Conference Room Location: AG's Conference Room POC: Jody Hunt Attendees: Jody Hunt, Lee Lofthus, Dana Boente, James Crowell, Jolene Lauria and Danielle Cutrona
5:15 PM - 5:15 PM	En Route to the White House * Must arrive by 5:30
5:45 PM - 5:45 PM	Depart from West Exec in White House Transportation
6:00 PM - 7:55 PM	Cabinet Affairs escorts Cabinet to Leader Kevin McCarthy Reception, -- H-107, Capitol Location: H-107, Capitol Attendees: Reception a small group of select Republican House and Senate members
8:00 PM - 8:50 PM	Cabinet Affairs will escort Cabinet to holding area -- H-219 Location: H-219 *Note that press will be set up in Statuary Hall
8:50 PM - 8:50 PM	Cabinet Affairs assists in lining Cabinet in Processional order (Jim Kaelin will assist, Congressional Cabinet Liaison)
9:01 PM - 9:01 PM	The President enters the Hall of the House announced by the House Sergeant at Arms and escorted to the dais

February 28, 2017 Continued

Tuesday

9:10 PM - 10:10 PM	Joint Session of Congress -- Capitol, House Floor Location: Capitol, House Floor
10:00 PM - 10:00 PM	Potential Press Availability-Cabinet Affairs communications, Brad Rateike and Kaelan Dorr will escort some Cabinet Members to Statuary Hall for press availability -- Statuary Hall
10:30 PM - 10:30 PM	Cabinet Members will depart via the Memorial Door and return to the White House West Exec
10:35 PM - 10:35 PM	AG to Meet detail in East Plaza of the Capitol

March 1, 2017

Wednesday

8:20 AM - 8:45 AM	Senior Meeting -- AG's Office Location: AG's office POC: Jody Hunt Attendees: Jody Hunt, Dana Boente, Jim Crowell, Jesse Panuccio
8:45 AM - 9:15 AM	Leadership Meeting -- AG's Conference Room POC: Jody Hunt Attendees: Jody Hunt (OAG), Dana Boente (ODAG), Jim Crowell (ODAG), Jesse Panuccio (OASG), Sam Ramer (OLA), Peter Carr (OPA), Ryan Newman (OLP), Danielle Cutrona, Rachael Tucker, David Rybicki
9:30 AM - 10:15 AM	FBI Briefing -- JCC Location: JCC POC: Tashina Gauhar Attendees: OAG: Jody Hunt and Rachael Tucker, ODAG: Acting DAG Boente, James Crowell, Tashina Gauhar, NSD: Mary McCord, George Toscas, Stu Evans, Michael Mullaney
10:00 AM - 10:30 AM	Task Force on Transnational Criminal Organization and Trafficking meeting Prep -- Situation Room in the Justice Command Center Location: Situation Room in the Justice Command Center POC: Danielle Cutrona Attendees: Jody Hunt, Danielle Cutrona, David Rybicki, Rachael Tucker; Bruce Ohr, Jim Crowell and Ken Blanco
10:30 AM - 11:30 AM	Task Force on Transnational Criminal Organization and Trafficking meeting -- Situation Room in the Justice Command Center Room 6100 Location: Situation Room in the Justice Command Center POC: Danielle Cutrona and Bruce Ohr Attendees: State: Acting Deputy Secretary Tom Shannon and Christine Ciccone DHS: Sec. Kelly (yes) with Kirstjen Nielsen and Ms. Dimple Shah; Mr. David Glawe, Acting Under Secretary, Intelligence and Analysis, DHS ODNI: National Intelligence Michael Dempsey; John Lombardi; Todd Porter; Lisa Wardach and Danielle Smallcomb OAG/ODAG Attendees: Jody Hunt, Danielle Cutrona, David Rybicki, Rachael Tucker; Bruce Ohr, Tasha Gauhar Jim Crowell and Ken Blanco
12:00 PM - 1:00 PM	LUNCH/Desk Time -- AG's Office

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March 1, 2017 Continued

Wednesday

1:00 PM - 1:30 PM

Interview: (b) (6) -- AG's Office
(b) (6)

Location: AG's Office

Attendees: Rod Rosenstein; Rachel Brand; and Jody Hunt

1:30 PM - 2:00 PM

Interview: (b) (6) -- AG's Office
(b) (6)

Location: AG's Office

POC: Jody Hunt

Attendees:

Jody Hunt

Racheal Brand (need to have information submitted as a visitor)

Rod Rosenstein

(b) (6)

2:00 PM - 2:30 PM

Interview: (b) (6) -- AG's Office
(b) (6)

Location: AG's Office

POC: Jody Hunt

Attendees:

Jody Hunt; Racheal Brand; Rod Rosenstein; (b) (6)

2:30 PM - 3:30 PM

Interview Discussion -- AG's Office

Location: AG's Office

POC: Jody Hunt

Attendees

Jody Hunt

Rachel Brand

Rod Rosenstein

3:30 PM - 4:30 PM

Meeting with the AAG Ken Blanco and CRM leadership -- AG's Conference Room

Location: AG's Conference Room

POC: David Rybicki

Attendees: David Rybicki, Ken Blanco, James Mann, Trevor McFadden,

Richard Downing, Denise Cheung, Bruce Swartz, (b) (6), Kendall

Day

Iris Lan

NOTES:

This would be to introduce the AG to the division, learn about its components, and high-profile matters currently pending

March 1, 2017 Continued

Wednesday

4:30 PM - 4:45 PM

Capital Case Review -- AG's Office

Location: AG's Office

POC: David Rybicki

Attendee: David Rybicki

5:30 PM - 6:00 PM

FISA SIGNATURE TIME -- AG's Conference Room

Location: OAG conference room

Attendees: OAG: Jody & Rachel; ODAG: James Crowell & Tashina

Gauhar; NSD: Stuart Evans, (b) (6), (b) (6), (b)

(b) (6), Dana Boente

March 2, 2017

Thursday

7:00 AM - 7:00 AM

En Route to AG's Office

8:20 AM - 8:45 AM

Senior Meeting -- AG's Office

Location: AG's office

POC: Jody Hunt

Attendees: Jody Hunt, Dana Boente, Jim Crowell, Jesse Panuccio

9:15 AM - 9:30 AM

Trips and Meeting request discussion with Rachael Tucker -- AG's office

Location: AG's Office

POC: Rachael

Attendee: Rachael Tucker

10:30 AM - 11:00 AM

National Fraternal Order of Police meeting -- AG's Office

Location: AG's Office

POC: Danielle

Attendees: Danielle Cutrona; Chuck Canterbury, National President, FOP
Jim Pasco, Senior Advisor, FOP

Notes:

The issues to be address are: asset forfeiture reform, sentencing reform, drug legalization and general anti-crime and criminals issues.

11:00 AM - 11:30 AM

FISA SIGNATURE TIME -- AG's Conference Room

Location: OAG conference room

Attendees: OAG: Jody & Rachel; ODAG: James Crowell & Tashina Gauhar; NSD: Stuart Evans, (b) (6)

(b) (6), (b) (6), (b) (6), Dana Boente

11:30 AM - 12:30 PM

Lunch/Desk time -- AG's Office

Location: AG's Office

1:00 PM - 1:15 PM

Meet/Greet: DOJ Inspector General Michael Horowitz -- AG's Office

Location: AG's Office

POC: Jody Hunt

March 2, 2017 Continued

Thursday

Attendees: Jody Hunt and Michael Horowitz

1:30 PM - 2:30 PM

FISA SIGNATURE TIME -- AG's Conference Room

Attendees: OAG: Jody & Rachel; ODAG: James Crowell & Tashina Gauhar; NSD: Stuart Evans, (b) (6)
(b) (6), (b) (6), Dana Boente

3:00 PM - 4:00 PM

Interview Prep -- AG's Office

Location: AG's Office

Attendees: Jody Hunt, Sarah Flores, Peter Carr, Scott Schools, David Rybicki and Rachael Tucker

4:15 PM - 5:15 PM

Gorsuch nomination discussion -- AG's Office

Location: AG's Office

POC: Jody Hunt

Attendees: Jody Hunt; Jesse Panuccio, Rachel Parker; Ryan Newman Sam Ramer, Gary Barnett and Danielle Cutrona

5:15 PM - 6:15 PM

Discussion on recusal issues -- AG's Conference Room

Location: AG's Conference Room

POC: Jody Hunt

Attendees: Jody Hunt, Dana Boente, Jim Crowell, Tash Gauhar, Scott Schools

8:15 PM - 8:15 PM

En Route to Tucker Carlson Show

8:30 PM - 9:30 PM

PRESS: Tucker Carlson Show -- 400 N Capitol Street;

AG POC: Sarah Flores

Tucker Carlson POC: Charlie Couger (b) (6)

9:30 PM - 9:30 PM

En Route to the AG's home (b) (6)

March 3, 2017

Friday

7:30 AM - 7:30 AM

En Route to AG's Office

8:20 AM - 8:45 AM

Senior Meeting -- AG's Office

Location: AG's office

POC: Jody Hunt

Attendees: Jody Hunt, Dana Boente, Jim Crowell, Jesse Panuccio

8:45 AM - 9:15 AM

Leadership Meeting -- AG's Conference Room

POC: Jody Hunt

Attendees: Jody Hunt (OAG), Dana Boente (ODAG), Jim Crowell (ODAG), Jesse Panuccio (OASG), Sam Ramer (OLA), Peter Carr (OPA), Ryan Newman (OLP), Danielle Cutrona, Rachael Tucker, David Rybicki

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March 3, 2017 Continued

Friday

9:30 AM - 10:15 AM **FBI Briefing -- JCC**
Location: JCC
POC: Tashina Gauhar
Attendees: OAG: Jody Hunt and Rachael Tucker, ODAG: Acting DAG Boente, James Crowell, Tashina Gauhar, NSD: Mary McCord, George Toscas, Stu Evans, Michael Mullaney

10:00 AM - 10:30 AM **Prep for NAACP meeting -- AG's office**
Attendee: Rachael Tucker and John Gore

10:30 AM - 11:00 AM **Meeting with Cornell William Brook, NAACP -- AG's Office**
[REDACTED]
[REDACTED] Clinical Bryant (OC)
[REDACTED] Location: AG's Office
AG POC: Rachael Tucker
POC: (b) (6) [REDACTED] Phone: (b) (6) [REDACTED]
Attendees: Rachael Tucker, John Gore
Cornell William Brooks, President/CEO of the NAACP: Bradford Berry, General Counsel of the NAACP Cell: (b) (6) [REDACTED]

11:00 AM - 11:30 AM **FISA SIGNATURE TIME -- AG's Conference Room**
Location: OAG conference room
Attendees: OAG: Jody & Rachel; ODAG: James Crowell & Tashina Gauhar; NSD: Stuart Evans, (b) (6) [REDACTED], (b) (6) [REDACTED], (b) (6) [REDACTED], Dana Boente

11:30 AM - 11:45 AM **Phone Call: Kevin Sabet, President of Smart Approaches to Marijuana -- AG's Office**
Location: AG's Office
POC: Danielle Cutrona
Participants: AG, Danielle Cutrona and Kevin Sabet
Call in number: (b) (6) [REDACTED]

12:00 PM - 12:20 PM **LUNCH/Desk Time -- AG's Office**
Location: AG's Office

12:20 PM - 12:20 PM **En Route to White House**

12:30 PM - 2:45 PM **Meeting at White House -- WHCO**
Attendees: AG and Jody Hunt

2:45 PM - 2:45 PM **En Route to AG's Office**

3:30 PM - 4:30 PM **Personnel Discussion -- AG's Office**
Location: AG's Office
Attendees: Jody Hunt, Rod Rosenstein and Rachel Brand

March 3, 2017 Continued

Friday

4:30 PM - 5:00 PM

Discussion -- AG's Office

Attendees: Jody Hunt, Scott Schools and James Crowell

EXHIBIT A

Public Citizen, Inc. v. United States Secret Service, No. 17-cv-01669 (CRC)

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between Plaintiff Public Citizen, Inc. (“Public Citizen”) and Defendant United States Secret Service (“Secret Service”) (collectively, “the Parties”) this 13th day of February, 2018.

WHEREAS, on April 19, 2017, June 5, 2017, and July 17, 2017, Public Citizen submitted Freedom of Information Act (“FOIA”) requests to Secret Service seeking records from the Workers and Visitors Entry System (“WAVES”) and the Access Control Records System (“ACR”), as well as any other system used to track visitors to the White House complex. Public Citizen specifically sought records related to visits to the Office of Management and Budget (“OMB”), the Office of Science and Technology Policy (“OSTP”), the Office of National Drug Control Policy (“ONDCP”), and the Council on Environmental Quality (“CEQ”) (collectively, the “FOIA Components”).

WHEREAS, Secret Service denied the FOIA requests based on its contentions that it is unable to distinguish WAVES and ACR records of visits to the FOIA Components from WAVES and ACR records of visits to other components within the Executive Office of the President (“EOP”), and that it transfers all WAVES and ACR records to the White House Office of Records Management (“WHORM”).

WHEREAS, Public Citizen filed suit on August 17, 2017, and an amended complaint on September 6, 2017, alleging violations of FOIA, 5 U.S.C. § 552 (“FOIA”), and the Administrative Procedure Act, 5 U.S.C. §§ 702 & 706, and seeking access to records reflecting visits to the FOIA Components.

WHEREAS, email addresses of employees of the FOIA Components indicate the FOIA Component for which the employee works.

WHEREAS, the Caller_Email field in the WAVES records automatically populates with the email address of the person who approved the appointment (“the requester”).

WHEREAS, the Parties wish to avoid further litigation and to enter into this Settlement Agreement.

NOW, THEREFORE, in consideration of the mutual agreements set forth below, the Parties agree as follows:

1. The White House will add computer functionality to the existing system containing WAVES records by which it can sort WAVES records by the requester’s email address in the Caller_Email field. The White House commits to effectuating the addition of this functionality forthwith, and no later than 21 days from the date of settlement.

Responsive WAVES and ACR Records from January 20, 2017, to the Date of Settlement.

2. Using the new functionality, the WHORM, which holds a copy of all WAVES records for the current Administration, will sort the WAVES and associated ACR records for the period from January 20, 2017, to the date of settlement, using the Caller_Email field in the WAVES records. If the email address in the Caller_Email field indicates that the requester is employed by one of the FOIA Components, the WAVES and associated ACR record will be presumed to be responsive to Public Citizen’s FOIA requests. Records in which the Caller_Email field indicates that the requester is employed by one of the FOIA Components are hereinafter referred to as “Responsive Records.” If the Caller_Email field in the record does not indicate that the requester is employed by one of the FOIA Components, the record will be treated as not responsive to the FOIA requests. No other records will be considered responsive to Public Citizen’s FOIA

requests. For purposes of this settlement, Public Citizen's FOIA requests include the requests underlying the instant litigation, as well as requests pending at the Secret Service for WAVES and ACR records of visits to the FOIA Components as of the date of settlement.

3. The parties understand and agree that the definition of Responsive Records in the foregoing paragraph does not necessarily mean that all appointments reflected in the Responsive Records represented visits to the FOIA Components. Rather, the Responsive Records will be presumed to be responsive solely because the requester's email address indicates that the requester is employed by a FOIA Component, subject to further review by the relevant component as described in paragraph 4 below.

4. The WHORM will distribute the Responsive Records to the component identified in the Caller_Email field for each respective component to review and process in accordance with FOIA. The components reserve their right to assert applicable FOIA exemptions and/or to assert that particular records are not subject to FOIA because on their face they reflect meetings with or other visits to components of the EOP subject to the Presidential Records Act. The FOIA Components will process under FOIA those 26 fields in the Responsive Records that were subject to the prior Administration's voluntary disclosure policy, which are set forth in Exhibit A. The redactions applied to the Responsive Records by the FOIA components, if any, will not be subject to litigation in this case or against the Secret Service.

5. The FOIA Components, other than OMB, will post the Responsive Records reflecting visits from January 20, 2017, to the date of execution of this Settlement Agreement to their respective FOIA online reading rooms within 90 days of execution of this Settlement Agreement. Beginning 60 days after the date of this Settlement Agreement, OMB will post its Responsive Records reflecting visits from January 20, 2017, to the date of this Settlement Agreement to its

FOIA online reading room, on a monthly basis, to be completed within 11 months of the date of this Settlement Agreement. OMB will make reasonable efforts to post documents at a uniform pace during the production period. By 5 months after this Settlement Agreement, OMB will have posted approximately 1/3 of the records. By 8 months, it will have posted approximately 2/3 of the records. Nothing in this paragraph shall prevent OMB from posting the records at a faster pace than set forth in this paragraph.

6. Public Citizen reserves the right to request under FOIA from the FOIA Components any Responsive Records that are redacted or withheld and to file actions against the FOIA Components challenging any such redactions or withholdings.

Responsive WAVES and ACR Records from the Date of Settlement to the End of the Trump Administration.

7. The Secret Service will continue its current practice of sending all WAVES and ACR records to the WHORM on a monthly basis. Within a week of receiving WAVES and ACR records, the WHORM will sort the records by the email address in the Caller_Email field and send Responsive Records to the FOIA Component indicated in the Caller_Email field. Each month, the FOIA Components will process the WAVES and ACR records received and, within a month of receiving the records, post them to their respective FOIA online reading rooms. The FOIA Components will process under FOIA those 26 fields set forth in Exhibit A. If the WAVES system is altered such that the names of the 26 fields are changed or the information contained in the 26 fields as of the time of this Settlement Agreement is moved to other fields, the FOIA Components will process the fields containing that information, as long as the WAVES system continues to contain that information.

8. Nothing in this agreement will prevent Public Citizen from requesting under FOIA any Responsive Records that the FOIA Components do not post or post only in redacted form or from filing actions against the FOIA Components challenging any such redactions or withholdings.

9. To ensure that the Caller_Email field will be the most accurate measure of which WAVES and ACR records reflect visits to the FOIA Components, the White House will make an additional change to the visitor approval system. That change will require that the requester for a visit to a FOIA component (*i.e.*, the official whose email address populates the Caller_Email field) must be from the same component as the person who initiates the visitor request in the program known as Appointment Center. In notifying EOP components of this change, the White House will instruct EOP that requesters should approve WAVES visits only if the visitor is visiting a person within the same component as the requester.

10. The requirement under this Agreement that the FOIA Components process and post their WAVES and ACR records as described herein will last until January 20, 2021, at which point this Agreement will expire. However, if, before January 20, 2021, EOP alters its email system such that email addresses of employees of the FOIA Components no longer indicate that the employee works for one of those components, or if, before January 20, 2021, the WAVES system is altered such that the Caller_Email field no longer automatically populates with the email address of the requester, the Agreement will expire at the time of that alteration. The day the Agreement expires is hereinafter referred to as the Expiration Date.

Dismissal, Release, and Fees

11. In consideration for the obligations agreed to above, within 3 business days after the execution of this Agreement, Public Citizen will file with the Court the Stipulation of Dismissal and Order attached as Exhibit B to this Settlement Agreement. The dismissal will be without

prejudice and will be effective upon the Court's entry of the Stipulation of Dismissal and Order on the docket as an order of the Court. This settlement agreement will not be attached to the Stipulation of Dismissal and Order.

12. After dismissal of this action, Public Citizen will not submit to Secret Service or cause to be submitted on its behalf to Secret Service further FOIA requests for copies of WAVES and ACR records documenting visits to the FOIA Components between January 20, 2017, and the Expiration Date.

13. Between the dismissal of this action and the Expiration Date, Public Citizen will not file any action challenging Secret Service's failure to respond to FOIA requests for WAVES and ACR records or Secret Service's practice of sending WAVES and ACR records to the WHORM.

14. The Parties' agreement to resolve this action by settlement does not constitute an admission with respect to the merits of the claims or defenses of any party.

15. Secret Service will pay to Public Citizen \$35,000, in full satisfaction of any claim for attorney fees and costs incurred in connection with this action (the "Payment"), payable within 60 days of entry of the Stipulation of Dismissal and Order on the docket as an order of the Court. Upon notification that the Court has entered such an order on the docket, Public Citizen will provide payment information to Secret Service, which will promptly complete and transmit the documentation necessary to effectuate this Payment. The Payment will be made by an electronic funds transfer to Public Citizen, Inc. pursuant to instructions from Public Citizen's counsel. Public Citizen agrees that the Payment will constitute full and final settlement of all claims for fees, costs, and expenses in this action.

16. Upon receipt of such Payment, Public Citizen will be deemed to have released and forever discharged Secret Service and its successors, the United States of America, and any department, agency, or establishment of the United States, and any officers, employees, agents, successors, or assigns of such department, agency, or establishment, from any and all past, present, or future claims for fees, costs, or litigation expenses in connection with the above-captioned litigation.

17. Upon dismissal of this action, Public Citizen will be deemed to have released and forever discharged Secret Service and its successors, the United States of America, and any department, agency, or establishment of the United States, and any officers, employees, agents, successors, or assigns of such department, agency, or establishment, from any and all past, present, or future claims that arise out of the FOIA requests on which this action is based.

18. The individuals executing this Settlement Agreement do so as agents or attorneys of their respective entities and covenant and represent that they have complete authority to enter into and execute this Settlement Agreement on behalf of their respective principals. All terms, provisions, conditions, and covenants herein shall be binding and shall inure to the benefit of the respective successors and assigns of Public Citizen and Secret Service.

19. This Settlement Agreement, including the Exhibits, constitutes the entire agreement between Public Citizen and Secret Service, and supersedes any prior oral or written agreement between them regarding this subject matter. All representations, understandings, or agreements between Public Citizen and Secret Service relating to this subject are herein expressed.

20. In the event any issues arise regarding performance of this Settlement Agreement by the Secret Service, WHORM, or the FOIA Components, the parties will, through counsel,

make reasonable efforts to resolve those issues outside of court. In the event that such efforts fail, the Settlement Agreement will be void, except that Public Citizen will retain the fees paid to it under paragraph 15.

21. This Settlement Agreement shall be deemed fully executed and effective upon the signature and agreement of all parties to this Settlement Agreement.

22. This Settlement Agreement may be executed in counterparts, each of which shall constitute an original and all of which together shall be deemed to be one and the same document.

WHEREFORE, after having reviewed the terms and conditions of this Settlement Agreement, each of the Parties hereto, through its undersigned representative, hereby consents to and agrees to the terms and conditions of this Settlement Agreement.

Dated: Feb 13, 2018

Dated: Feb. 13, 2018

FOR PLAINTIFF:



ADINA H. ROSENBAUM
PATRICK D. LLEWELLYN

PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street NW
Washington, DC 20009
Tel: (202) 588-1000

FOR DEFENDANT:



ELIZABETH J. SHAPIRO
Deputy Director

UNITED STATES DEPARTMENT OF
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Civil Division, Federal Programs Branch
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Exhibit A

NAMELAST
NAMEFIRST
NAMEMID
UIN
BDGNBR
ACCESS_TYPE
TOA
POA
TOD
POD
APPT_MADE_DATE
APPT_START_DATE
APPT_END_DATE
APPT_CANCEL_DATE
Total_People
LAST_UPDATEDBY
POST
LastEntryDate
TERMINAL_SUFFIX
visitee_namelast
visitee_namefirst
MEETING_LOC
MEETING_ROOM
CALLER_NAME_LAST
CALLER_NAME_FIRST
Description

Exhibit B

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PUBLIC CITIZEN, INC.,)	
)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:17-1669 (CRC)
)	
UNITED STATES SECRET SERVICE,)	
)	
Defendant.)	
)	
)	

STIPULATION OF DISMISSAL AND ORDER

Plaintiff Public Citizen, Inc. (“Public Citizen”) and Defendant United States Secret Service (“Secret Service”), having resolved this case through a settlement agreement, agree and stipulate as follows:

1. This Stipulation of Dismissal and Order shall constitute dismissal of the above-captioned action without prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The dismissal of the action shall be effective upon the Court’s entry of this Stipulation of Dismissal and Order on the docket as an order of the Court.
2. After dismissal of the action, Defendant shall pay to counsel for plaintiff a lump sum of \$35,000 in attorney fees and costs. Plaintiff agrees that payment of this sum shall constitute full and final settlement of all claims by Plaintiff for fees, costs, and expenses against Defendant in this action.

3. The Court retains jurisdiction to enforce the provisions of this Stipulation of Dismissal and Order.

Dated: February __, 2018

/s/ Adina H. Rosenbaum 
Adina H. Rosenbaum
(D.C. Bar No. 490928)
Patrick D. Llewellyn
(D.C. Bar No. 1033296)
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Plaintiff

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

/s/ Elizabeth J. Shapiro 
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Fax: (202) 616-8460
E-mail: elizabeth.shapiro@usdoj.gov

Attorneys for Defendant

SO ORDERED, this __ day of ___, 2018

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: July 26, 2018

-----X
:
KATE DOYLE, NATIONAL SECURITY :
ARCHIVE, CITIZENS FOR :
RESPONSIBILITY AND ETHICS IN :
WASHINGTON, and KNIGHT FIRST :
AMENDMENT INSTITUTE AT COLUMBIA :
UNIVERSITY, :
:
Plaintiffs, : 17 Civ. 2542 (KPF)
:
v. : OPINION AND ORDER
:
U.S. DEPARTMENT OF HOMELAND :
SECURITY and EXECUTIVE OFFICE OF :
THE PRESIDENT, :
:
Defendants. :
:
-----X

KATHERINE POLK FAILLA, District Judge:

Plaintiffs Kate Doyle, National Security Archive (“NSA”), Citizens for Responsibility and Ethics in Washington (“CREW”), and Knight First Amendment Institute (collectively, “Plaintiffs”) initiated this action against the United States Department of Homeland Security (“DHS”) and the Executive Office of the President (“EOP,” and with DHS, “Defendants”), after Doyle unsuccessfully attempted to obtain, under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, records related to visitors of President Trump at the White House Complex, as well as at his properties at Trump Tower, in New York, and Mar-a-Lago, in Florida. The operative complaint brings claims under FOIA, the Administrative Procedure Act (“APA”), 5 U.S.C. ch. 5, the Federal Record Act (“FRA”), 44 U.S.C. §§ 2102-2118, 2901-2910, 3101-3107,

3301-3324, and the Presidential Records Act (“PRA”), 44 U.S.C. §§ 2201-2209; it seeks injunctive relief and, under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, declaratory relief.

Defendants have moved for summary judgment on Plaintiffs’ FOIA claims and to dismiss the remainder of Plaintiffs’ claims for lack of subject matter jurisdiction and, alternatively, for failure to state a claim. For the reasons that follow, the Court grants in part and denies in part Defendants’ motion for summary judgment, and grants Defendants’ motion to dismiss in full.

BACKGROUND¹

A. Factual Background

1. The Parties

a. The Plaintiffs

“Plaintiff [NSA] is an independent, non-governmental, non-profit research institute organized under section 501(c)(3) of the Internal Revenue Code.” (Am. Compl. ¶ 5). The NSA obtains government documents through FOIA, and “collects, analyzes, and publishes” them “to enrich scholarship and

¹ This Opinion draws on factual allegations in the Amended Complaint (Dkt. #32 (“Am. Compl.”)), along with the declarations submitted by the parties in support of, and in opposition to, the instant motions and the exhibits attached thereto. Those declarations consist of the following: for Defendants, the Second Declaration of Kim E. Campbell, Special Agent in Charge, Liaison Division, and FOIA Officer, United States Secret Service (Dkt. #46 (“Campbell Decl.”)), the Declaration of James M. Murray, Deputy Assistant Director, Office of Protective Operations, United States Secret Service (Dkt. #47 (“Murray Decl.”)), the Declaration of Supervisory Information Technology Specialist William Willson, United States Secret Service (Dkt. #48 (“Willson Decl.”)), the Declaration of Philip C. Droege (Dkt. #49 (“Droege Decl.”)), and the Declaration of Charles Christopher Herndon (Dkt. #50 (“Herndon Decl.”)); and for Plaintiffs, the Declaration of Anne L. Weismann (Dkt. #52-1 (“Weismann Decl.”)). For ease of reference, the Court refers to Defendants’ memorandum of law in support of their motions for summary judgment and dismissal (Dkt. #51) as “Def. Br.”; Plaintiffs’ memorandum of law in opposition to the motions (Dkt. #52) as “Pl. Opp.”; and Defendants’ reply to Plaintiffs’ opposition (Dkt. #55) as “Def. Reply.”

journalism . . . , and to promote openness and government accountability.” (*Id.*). Plaintiff Kate Doyle is a senior analyst focusing on United States policy in Latin America, who works in NSA “to open and analyze government files, including through the use of the FOIA.” (*Id.* at ¶ 4).

“Plaintiff CREW is a non-profit, non-partisan organization organized under section 501(c)(3) of the Internal Revenue Code.” (Am. Compl. ¶ 6). CREW advocates for government openness and accountability through “a combination of research, litigation, and advocacy.” (*Id.*). A similar operation, Plaintiff Knight First Amendment Institute at Columbia University is a New York not-for-profit corporation seeking “to preserve and expand the freedoms of speech and the press” through “litigation, research, and public education.” (*Id.* at ¶ 7). Both organizations utilize FOIA requests in furtherance of their missions. (See *id.* at ¶¶ 6-7).

b. The Defendants

DHS is a federal agency that includes, as one of its components, the United States Secret Service, which is required by statute to provide security to the President and Vice President. *See* 18 U.S.C. §§ 3056(a)(1), 3056A(a)(4). Acceptance of the Secret Service’s protection is mandatory for the President, Vice President, President-elect, and Vice President-elect. *See Judicial Watch, Inc. v. U.S. Secret Serv.*, 726 F.3d 208, 211 (D.C. Cir. 2013) (citing Pub. L. No. 98-587, 98 Stat. 3110 (1984) (codified at 18 U.S.C. § 3056(a)). (See also Murray Decl. ¶ 3). The Secret Service’s protection also extends to the edifices

associated with the offices of the President and Vice President. *See* 18 U.S.C. § 3056A(a).

The Executive Office of the President (the “EOP”) comprises various bodies, including the White House Office, which, in turn, includes the President’s immediate staff, the White House Counsel’s Office, and the Staff Secretary’s Office. (Herndon Decl. ¶ 2). The EOP also encompasses the Council on Environmental Quality (“CEQ”); the Office of Management and Budget (“OMB”); the Office of National Drug Control Policy (“ONDCP”); the Office of Science and Technology Policy (“OSTP”); and the Office of the United States Trade Representative (“USTR”). (Am. Compl. ¶ 9).

2. Records of Presidential Visitors

Plaintiffs seek from the DHS records maintained by the Secret Service spanning the period of January 20, 2017, through March 8, 2017, related to visits to the White House and to President Trump at his Mar-a-Lago and Trump Tower residences. (See Am. Compl. ¶¶ 1, 34, 39). DHS contends that although the security responsibility of the Secret Service extends to the White House Complex, it “does not have a similar statutory authority to protect Mar-a-Lago or Trump Tower.” (Murray Decl. ¶ 3). The declarations that DHS has submitted in support of its motions thus focus on the policies and procedures attendant to records of White House Complex visitors, and this section summarizes those guidelines.

a. Records of White House Complex Visitors

In order to vet, identify, and monitor visitors to the White House Complex, the Secret Service employs two interconnected electronic systems: (i) the Executive Facilities Access Control System (“EFACS”), through which the Secret Service controls and monitors White House Complex access; and (ii) the Worker and Visitor Entrance System (“WAVES”), which the Secret Service uses to vet visitors to the White House Complex. (Murray Decl. ¶¶ 6-7).

Authorized White House Complex passholders may request permission for a visitor to the White House Complex by providing visitor information to the Secret Service through a system called “Appointment Center” or the “WAVES Request System” (“WRS”). (Murray Decl. ¶ 8). Through these systems, WAVES gathers information related to prospective visitors, which information allows a Secret Service member to verify that the requestor is authorized to make appointments for the location requested, to acquire additional information, to conduct a background check, and to transmit the information to the EFACS server. (*Id.*). WAVES records include a variety of information fields, such as whether a visit is related to a certain event at the White House Complex or is subject to certain restrictions. (*Id.* at ¶ 9).

When an individual receives approval to visit the White House Complex, he or she typically receives a badge to “swipe” over electronic badge readers located at entrances and exits to the White House Complex; each swipe generates an “Access Control Record” (“ACR”) within the EFACS system. (Murray Decl. ¶ 10). An ACR contains information such as the visitor’s name,

and the date, time, and location at which the ACR was generated, which, “[o]nce a visit takes place,” is integrated into the WAVES records. (*Id.* at ¶¶ 10-11). These aggregated records contain information identifying the visitor, visitee, and individual who made the appointment; as well as details of the visit, such as the points of entry and departure, the type of escort the visit requires, and whether the visit involved a highly sensitive meeting. (Willson Decl. ¶ 7). This dispute principally revolves around WAVES and ACR records.

b. Recordkeeping Practices Related to WAVES and ACR Records

DHS contends that because the Secret Service utilizes WAVES records to vet potential visitors and verify visitors’ admissibility at the time of a visit, the Secret Service ceases to have an interest in maintaining such information after the completion of a visit. (See Murray Decl. ¶¶ 8, 13). Thus, “[s]ince at least 2001,” the Secret Service has maintained a practice of transferring WAVES records to the White House Office of Records Management (“WHORM”) “generally every 30 to 60 days.” (*Id.* at ¶ 13; *see also* Droege Decl. ¶ 4). “[A]s early as 2001,” the White House and Secret Service agreed that ACR records “should be treated in a manner generally consistent with WAVES records,” and thus, “[s]ince at least 2006,” the Secret Service has transferred ACR records to the WHORM every 30 to 60 days. (Droege Decl. ¶ 5).

“[S]ince at least 2009,” the Secret Service has transferred WAVES records to WHORM every 30 days. (Murray Decl. ¶ 13; *see also* Willson Decl. ¶ 5; Droege Decl. ¶ 4). After transferring the records, “[i]t is the intent of the Secret Service” that the records “be erased from [their] computer system,” and WAVES

records over 60-days old are normally “auto-deleted” and “overwritten on the servers.” (Murray Decl. ¶ 13; *see also* Willson Decl. ¶ 6 (“Records that are older than 60 days are ordinarily auto-deleted from the server operated by the Secret Service on a rolling basis.”)).² “Currently, the after-visit records that are transferred to the WHORM constitute a combination of WAVES and ACR information.” (Murray Decl. ¶ 15).

In May 2006, the Secret Service Records Management Program and WHORM entered into a Memorandum of Understanding (the “2006 MOU”), which reflected the above practices regarding WAVES and ACR records. (See Murray Decl. ¶ 14; Droege Decl. ¶ 6). The 2006 MOU also expressed the Secret Service’s and WHORM’s understanding that such records “are at all times Presidential Records,” “are not Federal Records,” and “are not the records of an ‘agency’ subject to the Freedom of Information Act[.]” (Murray Decl., Ex. A at ¶ 17). The 2006 MOU also provided that (i) such records “are at all times under the exclusive legal custody and control of the White House”; (ii) only the White House has a “continuing interest” in such records; (iii) “the Secret Service has no continuing interest in preserving or retaining” such records; and (iv) the Secret Service “will regularly transfer” such records to WHORM. (*Id.*, Ex. A at ¶¶ 18, 20-22).

² Because of pending litigation, and with White House permission, as of August 19, 2017, the Secret Service disabled the auto-delete function for WAVES records. (Murray Decl. ¶ 21). “The Secret Service will maintain a copy of the WAVES and ACR records that are sent to the WHORM during the pendency of that litigation, as well as this case.” (*Id.*).

On March 19, 2015, President Obama issued a memorandum creating the position of the Director of White House Information Technology (“DWHIT”), who is “responsible for the information resources and information systems provided to the President, Vice President and [EOP].” (Herndon Decl. ¶¶ 1, 3). The memorandum also established the Presidential Information Technology Community in order to “bring[] various [information] systems and resources into a single community under the auspices of the DWHIT,” which “would enhance the security of those systems and resources.” (*Id.* at ¶¶ 3-4). Pursuant to the authority vested by President Obama’s memorandum and in furtherance of the aims of that memorandum, in September 2015, the Presidential Information Technology Community entered into a Memorandum of Understanding with the member-entities of the Presidential Information Technology Community (the “2015 MOU”), including the Secret Service,³ which MOU purported to provide protocols governing its operations. (*Id.* at ¶¶ 5-6).

The 2015 MOU provides that “[a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component.” (Murray Decl. ¶ 17 (alteration in original); *see also* Herndon Decl. ¶¶ 8-9). Pursuant to the 2015 MOU — and despite the facts that the “WAVES servers are located at the Secret Service’s

³ The other members of the Presidential Information Technology Community consist of the National Security Council, the Office of Administration, the White House Military Office, and the White House Communications Agency. (Herndon Decl. Ex. A, at 3).

headquarters ... and Secret Service personnel operate this machinery" — DHS maintains that "the President is the business owner of the EFACS and WAVES systems, and the Secret Service operates those systems on behalf of the President, acting as a service provider." (Murray Decl. ¶ 16). As a result of the 2015 MOU, after a visit has concluded, the Secret Service must request permission from the White House to view records of the visit, and if the records have been transferred to WHORM, the Secret Service must also contact WHORM to access the records. (*Id.* at ¶ 19). The Secret Service must similarly request permission from the DWHIT to modify the WAVES or EFACS systems. (*Id.* at ¶ 20).

Under the Obama Administration, on September 15, 2009, the White House implemented a policy of voluntarily disclosing certain information contained in WAVES and ACR records. (Droege Decl. ¶ 12). This disclosure policy contained various exceptions, including information implicating personal privacy or law enforcement concerns, personal safety of EOP staff, and national security concerns. (*Id.* at ¶ 13). The current administration rescinded this policy on April 14, 2017. (*Id.* at ¶ 14).

3. The FOIA Requests Preceding This Litigation

a. Plaintiffs' FOIA Requests

Plaintiffs allege that on January 23, 2017, Plaintiff Kate Doyle sent a FOIA request via facsimile to the Secret Service "requesting all WAVES and ACR records for" January 20 through January 22, 2017. (Am. Compl. ¶ 34). More specifically, Doyle requested 28 data fields that were previously made

available to the public through the Obama Administration’s Visitor Records Requests website. (*Id.*). After receiving no response from the Secret Service, on February 24, 2017, Doyle sent an administrative appeal of her request to the Secret Service via facsimile. (*Id.* at ¶ 35). DHS contends that it has no record of receiving either the initial request or the administrative appeal, but it acknowledges that after filing the complaint in this case, Plaintiffs provided documentation indicating that both the request and administrative appeal had been faxed to the DHS. (Campbell Decl. ¶¶ 4-5).

In any event, on March 10, 2017, Plaintiffs sent a second FOIA request to the Secret Service, seeking the extraction of the same 28 data fields from (i) “all WAVES and ACR records from January 20, 2017 until March 8, 2017,” and (ii) “records of presidential visitors at Mar-a-Lago and Trump Tower from January 20, 2017 to March 8, 2017.” (Am. Compl. ¶ 39). This second request also sought expedited processing “in light of [Plaintiffs’] significant concerns ... about how President Trump [was] using his private properties at Mar-a-Lago and Trump Tower, the extensive media coverage of this issue, and the refusal of the President to date to commit to releasing the visitor logs data.” (*Id.* at ¶ 40). Unlike the first request, DHS acknowledges receiving this request, to which DHS responded by letter on April 11, 2017, in which it denied Plaintiffs’ request for expedited treatment. (See Campbell Decl. ¶ 6; *id.* at Ex. A).

b. The Secret Service’s Response to the Requests

In response to Plaintiffs’ FOIA requests, DHS maintains that WAVES and ACR records are not Secret Service records, but rather are Presidential Records

not subject to FOIA; DHS therefore “did not seek to search for, locate, or process these records.” (Campbell Decl. ¶ 7). Further, “the Secret Service “was aware that President Trump had not traveled to Trump Tower during the requested time period” and “after confirming this information, the Secret Service did not seek to search for the material requested by Plaintiffs.” (*Id.* at ¶ 8).⁴

The Secret Service handled Plaintiffs’ request for information regarding Mar-a-Lago visitors in a different fashion. Although the Secret Service “easily … confirmed” that it did not “utilize WAVES or ACR records at Mar-a-Lago, it was unclear what, if any, record systems or record groupings might exist in regard to who visited the President at Mar-a-Lago, or where such record systems or record groupings might be located.” (Campbell Decl. ¶ 9). The Secret Service thus undertook a set of searches “to determine what, if any, record systems or record groupings existed that might contain information potentially responsive to Plaintiffs’ request,”⁵ but according to DHS, this search ultimately revealed “no system for keeping track of visitors to Mar-a-Lago, as there is at the White House Complex.” (*Id.* at ¶¶ 10-11). DHS therefore contends that, regarding the 28 data fields Plaintiffs seek, “the Secret Service maintains no record and has no access to any record directly responsive to

⁴ In light of this information, Plaintiffs no longer seek records related to Trump Tower. (See Pl. Opp. 2 n.1).

⁵ The Court discusses this search in more granular detail *infra*.

Plaintiffs' request for records of presidential visitors at Mar-a-Lago." (*Id.* at ¶ 13).

Further, aside from the 28 data fields that were available under a prior administration, DHS contends that its search uncovered only one record that was subject to FOIA — a two-page email from the Department of State that was forwarded to the Secret Service — which DHS provided to Plaintiffs in redacted form. (Campbell Decl. ¶ 14).⁶ The email "evidenced potential visitors to Mar-a-Lago, some of whom were scheduled to attend a dinner with the President." (*Id.* at ¶ 33). Before turning the email over to Plaintiffs, the DHS redacted "the names, email addresses, and a cell phone number of third parties," claiming that such information was exempt from disclosure under FOIA. (*Id.*).

The Secret Service's search also revealed records involving a visit by the Prime Minister of Japan, Shinzo Abe, along with his wife, to Mar-a-Lago; in addition, the search produced "a handful of records that referred to individuals who were scheduled to meet with the President at Mar-a-Lago." (Campbell Decl. ¶¶ 26-27).⁷ DHS contends that documents in the latter category "contain, reflect, or directly relate to Presidential schedules" and are therefore "Presidential records within the meaning of the [Presidential Records Act]" and are not subject to FOIA. (*Id.* at ¶ 31). As to the records involving Prime

⁶ The parties also agreed to exclude records involving presidential family members, cabinet members, and White House staff who visited Mar-a-Lago, and records involving "local law enforcement and support personnel scheduled to have their photographs taken with the president." (Campbell Decl. ¶¶ 24-25; *see also* Pl. Opp. 22 n.8).

⁷ DHS contends that these documents "indicate the possibility of a 'presidential visit,'" rather than "whether a visit actually took place." (Campbell Decl. ¶ 29).

Minister Abe, DHS decided that they are “not records of Presidential visitors at Mar-a-Lago,” but instead “operational material that merely contain a repeated statement that the Prime Min[i]ster of Japan and his spouse would be meeting or dining or present with the President and First Lady at Mar-a-Lago, a widely published fact that [w]as already disclosed by the White House.” (*Id.* at ¶ 32). DHS also argues that the records involving Prime Minister Abe are “duplicative” of the redacted State Department email that was provided to Plaintiffs. (*Id.*).

B. Procedural Background

On April 10, 2017, after receiving no response from the Secret Service within the timeframe required under FOIA,⁸ Plaintiffs filed the initial complaint in this case. (*See* Am. Compl. ¶¶ 41-45; Dkt. #1). On July 14, 2017, the parties appeared for an initial pretrial conference, pursuant to which the Court issued an order directing the “Secret Service [to] complete its search for and processing of responsive ‘records of presidential visitors at Mar-a-Lago,’ and produce any non-exempt responsive records, by September 8, 2017”; the Court scheduled summary judgment briefing after such production. (Dkt. #23). The Court later extended the deadline for such production to September 15, 2017. (Dkt. #28).

The Court also granted Plaintiffs leave to file an amended complaint and issued a revised summary judgment briefing schedule on September 14, 2017. (Dkt. #30). The next day, Plaintiffs amended their complaint, which they now

⁸ An agency generally has 20 days to respond to a FOIA request. *See* 5 U.S.C. § 552(a)(6)(A)(i).

bring under FOIA, the APA, the FRA, and the PRA, in pursuit of injunctive and declaratory relief. (See Dkt. #32). On October 23, 2017, DHS moved for summary judgment on Plaintiffs' FOIA claims and to dismiss the remaining claims for failure to state a claim and lack of subject matter jurisdiction. (See Dkt. #45-51). On December 4, 2017, Plaintiffs opposed the motion (Dkt. #52), and DHS replied to Plaintiffs' opposition on January 12, 2018 (Dkt. #55).

The Court's analysis will proceed as follows: *First*, the Court addresses a request for judicial notice that Plaintiffs made after summary judgment briefing closed; *second*, the Court addresses Plaintiffs' FOIA claims; *third*, the Court addresses Plaintiffs' claims involving the APA, FRA, and PRA; and *fourth*, the Court addresses Plaintiffs' claim for declaratory judgment.

DISCUSSION

A. The Court Denies Plaintiffs' Request for Judicial Notice

Before addressing the merits of Defendants' motions, the Court resolves a late-breaking dispute among the parties. On February 20, 2018, after summary judgment briefing had concluded, Plaintiffs filed a letter requesting that the Court take judicial notice of a settlement into which the Secret Service had entered in *Public Citizen, Inc. v. United States Secret Service*, No. 17 Civ. 1669 (CRC) (D.D.C.) (the "Public Citizen Settlement" or the "Settlement"). (Dkt. #58). The Settlement explains that, much like the case at bar, the plaintiff in that action, Public Citizen, Inc., had submitted FOIA requests to the defendant, the United States Secret Service, seeking WAVES and ACR records, along with records from "any other system used to track visitors to the White House

complex.” (Dkt. #58, Ex. A (Settlement Agreement)). These requests “specifically sought records related to visits” to the following EOP components: the OMB, OSTP, ONDCP, and CEQ. (*Id.*). As a result of the Settlement, the White House was to “add computer functionality to the existing system containing WAVES records by which it can sort WAVES records by the requester’s email address[.]” (*Id.*).

1. The Parties’ Positions on Plaintiffs’ Judicial Notice Request

In requesting that the Court judicially notice the Settlement, Plaintiffs contend that the agreement establishes that the “Secret Service can distinguish between records of visits to agency components [of the EOP] from records of visits to non-agency components,” as the Settlement requires the Secret Service “to add a functionality to its system that would allow it to sort WAVES records by the requester’s email address, process the records [requested by the plaintiff in that separate action], and post them in agency online reading rooms.” (Dkt. #58).

On February 27, 2018, Defendants responded to Plaintiffs’ request, providing no objection to the Court taking judicial notice of the Settlement, but arguing that the agreement in fact supported Defendants’ pending motions. (Dkt. #59). In particular, Defendants argue that the Settlement expressly acknowledges that an appointment requester’s email address “does not necessarily show that a WAVES record reflects an EOP agency component visit,” and that any functionality changes pursuant to the Settlement would be within the control of the White House rather than the Secret Service. (*Id.*).

Indeed, Defendants contend that the Settlement renders moot Plaintiffs' FRA and PRA claims, insofar as they "allege wrongful treatment of agency records by EOP and the Secret Service" for failing to "distinguish between records of visits to Presidential components of EOP (which are not subject to FOIA) and records of visits to agency components of EOP (which are)." (*Id.*). In Defendants' view, the Settlement "creates a mechanism for doing just that, thereby mooting Plaintiffs' FRA and PRA claims in their entirety," and "the [S]ettlement provides virtually all the relief that [P]laintiffs could achieve under FOIA, and more." (*Id.*). Further, Defendants argue that the only aspect of Plaintiffs' FOIA claim "that is not moot is the possibility that plaintiffs may wish to challenge any redactions that the EOP agency components may apply to the records before posting," but because any such redactions and corresponding objections are unknown at this point, the Court should hold this portion of Plaintiffs' FOIA claim in abeyance and dismiss the remainder of Plaintiffs' claims. (*Id.*).

Plaintiffs replied to Defendants' response on March 2, 2018, arguing at the outset that Defendants' opposition letter improperly raised grounds for summary judgment and dismissal that were not raised in Defendants' formal briefing. (Dkt. #60). In addition, Plaintiffs contend that the *Public Citizen* Settlement does not render the claims at issue moot for three reasons:

- *First*, the Settlement "expires" if either the EOP modifies its email system so that email addresses no longer indicate that an employee works for an EOP component, or the White House modifies the WAVES system so that it does not automatically populate the email address of an appointment requester. (*Id.*).

- *Second*, until Defendants have searched for the records that Plaintiffs are seeking and produced all non-exempt records, the Settlement does not speak to any challenges Plaintiffs might raise to Defendants' withholding of records. (*Id.*).
- *Third*, the Settlement defines "FOIA components" within the EOP more narrowly than Plaintiffs' operative complaint.

(*Id.*).⁹

2. Plaintiffs' Request for Judicial Notice Is Denied

Under the Federal Rules of Evidence, a "court may judicially notice a fact that is not subject to reasonable dispute" where it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). "[B]ecause the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b)." *Braun v. United Recovery Sys., LP*, 14 F. Supp. 3d 159, 164 (S.D.N.Y. 2014) (alteration in original) (citation omitted). "A court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *Int'l Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A., Inc.*, 146 F.3d 66, 70 (2d Cir. 1998) (quoting *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)).

⁹ The operative complaint defines "FOIA components" of the EOP to include the Office of the United States Trade Representative, while the Settlement does not. (Dkt. #60).

The scope of Plaintiffs' request for judicial notice of the *Public Citizen* Settlement far exceeds the purposes for which the Court may properly consider it. Although Defendants do not object to judicial notice of the fact of the Settlement, the parties' submissions on the issue make clear that they vehemently disagree as to which facts the Court should glean from the Settlement Agreement. (*Compare* Dkt. #58, 60, *with* Dkt. #59). Because both sides have offered plausible views of the practical implications of the Settlement, *a fortiori*, the Court cannot find that the factual purpose for which Plaintiffs urge the Court to consider the Settlement would be beyond "reasonable dispute." Fed. R. Evid. 201(b).

Moreover, to grant Plaintiffs' request would not only require the Court to consider the Settlement for the truth of the matters stated therein, but to make the inferential leap of drawing facts from the Settlement that are not necessarily borne out by its terms. To be sure, a court may judicially notice a settlement agreement to establish the fact of a prior litigation. *See, e.g., Deylil v. Novartis Pharm. Corp.*, No. 13 Civ. 6669 (NSR), 2014 WL 2757470, at *4 (S.D.N.Y. June 16, 2014) (collecting cases). But it may not do so to take as true any facts contained in such settlement agreement. *See Int'l Star Class Yacht Racing Ass'n*, 146 F.3d at 70. The Court therefore denies Plaintiffs' request that the Court judicially notice the *Public Citizen* Settlement.

B. Defendants' Summary Judgment Motion Is Granted in Part and Denied in Part

1. Applicable Law

a. FOIA Generally

FOIA vests federal courts with “jurisdiction to enjoin [a federal] agency from withholding agency records and to order the production of any agency records improperly withheld[.]” 5 U.S.C. § 552(a)(4)(B).¹⁰ The statute mandates disclosure of any requested “agency records” unless they fall within one of FOIA’s enumerated exemptions. *See Grand Cent. P’ship, Inc. v. Cuomo*, 166 F.3d 473, 478 (2d Cir. 1999); *Adamowicz v. I.R.S.*, 672 F. Supp. 2d 454, 461 (S.D.N.Y. 2009), *aff’d*, 402 F. App’x 648 (2d Cir. 2010) (summary order). FOIA thus allows public access to information held by agencies of the federal government, but such access is not limitless: In enacting FOIA, Congress sought to strike a balance between the public’s interest in government transparency and accountability, and the Government’s need to hold sensitive information in confidence. *See Nat’l Council of La Raza v. Dep’t of Justice*, 411 F.3d 350, 355-56 (2d Cir. 2005); *Nat. Res. Def. Council, Inc. v. U.S. Dep’t of Interior*, 36 F. Supp. 3d 384, 397 (S.D.N.Y. 2014) (quoting *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989)).

¹⁰ The Second Circuit has explained that “jurisdiction,” in this context, refers to a federal court’s “remedial power, not subject-matter jurisdiction,” meaning that 5 U.S.C. § 552(a)(4)(B) “does not speak to the court’s ability to adjudicate a claim, but only to the remedies that the court may award.” *Main St. Legal Servs., Inc. v. Nat’l Sec. Council*, 811 F.3d 542, 566 (2d Cir. 2016).

b. Resolving FOIA Claims at Summary Judgment

Summary judgment is the usual mechanism for resolving a FOIA dispute. *N.Y. Times Co. v. United States Dep’t of Justice*, 235 F. Supp. 3d 522, 529 (S.D.N.Y. 2017). Federal jurisdiction over a FOIA action requires “a showing that an agency has [i] ‘improperly’ [ii] ‘withheld’ [iii] ‘agency records,’” and “[o]nly when these criteria are met may a district court ‘force an agency to comply with the FOIA’s disclosure requirements.’” *Grand Cent. P’Ship*, 166 F.3d at 478 (quoting *U.S. Dep’t of Justice v. Tax Analysts* (“*Tax Analysts II*”), 492 U.S. 136, 142 (1989)). Where, as here, “the question is whether requested documents are ‘agency records’ subject to disclosure under FOIA, [t]he burden is on the agency to demonstrate, not the requester to disprove, that the materials sought are not ‘agency records[.]’” *Id.* (quoting *Tax Analysts II*, 492 U.S. at 142 n.3). A court reviews *de novo* an agency’s decision to withhold information. *N.Y. Times Co.*, 235 F. Supp. 3d at 529 (citing 5 U.S.C. § 552(a)(4)(B)).

A district court considering a FOIA claim “may grant summary judgment in favor of an agency ‘on the basis of agency affidavits if they contain reasonable specificity of detail rather than merely conclusory statements, and if they are not called into question by contradictory evidence in the record or by evidence of agency bad faith.’” *Grand Cent. P’ship*, 166 F.3d at 478 (quoting *Gallant v. NLRB*, 26 F.3d 168, 171 (D.C. Cir. 1994)); *see also Garcia v. U.S. Dep’t of Justice, Office of Info. & Privacy*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002) (“If the agency’s submissions are facially adequate, summary judgment is

warranted unless the plaintiff can make a showing of bad faith on the part of the agency or present evidence that the exemptions claimed by the agency should not apply.”). “As such, where the agency’s submissions are ‘adequate on their face,’ district courts ‘may forgo discovery and award summary judgment on the basis of affidavits.’” *N.Y. Times Co.*, 235 F. Supp. 3d at 529 (quoting *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)). Conversely, “[s]ummary judgment in favor of the FOIA plaintiff is appropriate ‘when an agency seeks to protect material which, even on the agency’s version of the facts, falls outside the proffered exemption.’” *Nat. Res. Def. Council, Inc.*, 36 F. Supp. 3d at 398 (quoting *N.Y. Times Co. v. U.S. Dep’t of Def.*, 499 F. Supp. 2d 501, 509 (S.D.N.Y. 2007))).¹¹

c. Defining “Agency Records” Under FOIA

The propriety of Defendants’ decision to withhold the WAVES and ACR records at issue turns on whether those records are “agency records,” and thus subject to disclosure under FOIA. By all accounts, this is an issue of first impression within this Circuit. Yet, as discussed below, the Court of Appeals for the District of Columbia Circuit has addressed this very issue, and the parties therefore focus initially on disputing whether the Court should adopt

¹¹ Indeed, “[t]he general rule in this Circuit is that in FOIA actions, agency affidavits alone will support a grant of summary judgment,’ and Local Civil Rule 56.1 statements are not required.” *N.Y. Times Co. v. U.S. Dep’t of Justice*, 872 F. Supp. 2d 309, 314 (S.D.N.Y. 2012) (quoting *Ferguson v. Fed. Bureau of Investigation*, No. 89 Civ. 5071 (RPP), 1995 WL 329307, at *2 (S.D.N.Y. June 1, 1995), *aff’d*, 83 F.3d 41 (2d Cir. 1996)). The Court therefore rejects Plaintiffs’ bid to deny Defendants’ summary judgment motion for failure to submit an accompanying Local Civil Rule 56.1 statement along with their motion for summary judgment. (See Pl. Opp. 3-4).

the D.C. Circuit's approach here.¹² The Court discusses the various bases of the D.C. Circuit's approach, and then considers the parties' arguments supporting and opposing adoption of that approach.

i. Supreme Court Decisions: *Kissinger*, *Forsham*, and *Tax Analysts II*

The progenitor of modern FOIA case law is *Kissinger v. Reporters Commission for Freedom of the Press*, where the Supreme Court held that Congress did not intend FOIA to define an “agency” to include “the Office of the President,” meaning the President, his “immediate personal staff[,] or units in the Executive Office whose sole function is to advise and assist the President[.]” 445 U.S. 136, 156 (1980) (quoting H.R. Rep. No. 93-1380, at 232 (1974) (Conf. Rep.)). There, the Court held in relevant part that notes of telephone conversations of then-Assistant to the President for National Security Affairs, Henry Kissinger, were not “agency records” subject to FOIA, as the requested documents were generated while Kissinger was acting in his capacity as a presidential adviser. *Id.* at 157. And this was so even though, at the time of the FOIA request, the notes were removed from White House files and physically transferred to an agency subject to FOIA — Kissinger’s office at the Department of State, where Kissinger was serving as the Secretary of State. *Id.*

¹² This Court observes that the Second Circuit has previously “acknowledge[d] the considerable experience of the Court of Appeals for the District of Columbia Circuit” in analyzing FOIA’s application to records generated by units of the Executive Office of the President. *Main St. Legal Servs., Inc.*, 811 F.3d at 547 (holding that National Security Council is not an agency subject to FOIA).

In *Forsham v. Harris*, a companion case to *Kissinger*, the Court addressed a separate definitional issue: Whether materials generated by a private organization that has received federal funds from an agency, but has not transmitted the materials back to that agency, are agency records subject to FOIA. *See* 445 U.S. 169, 178 (1980). Answering the question in the negative, the Court held that “an agency must first either create or obtain a record as a prerequisite to its becoming an ‘agency record’ within the meaning of FOIA.” *Id.* at 182. While noting that FOIA does not define the term “agency records,” the Court drew its conclusion from FOIA’s definition of “agency” and its legislative history, both of which indicated that Congress did not intend to subject private organizations receiving federal funds to FOIA. *Id.* at 178-79. The Court also noted that the use of the term “record” in related statutes such as the Records Disposal Act and the PRA suggested that an agency record must at least be “create[d] or obtain[ed]” by the agency. *Id.* at 182-84.

Drawing from *Kissinger* and *Forsham*, the Supreme Court expanded on what constitutes an “agency record” for FOIA purposes in *United States Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989). The Court held that to qualify as an agency record, requested materials must (i) either be “create[d] or obtain[ed]” by an agency, and (ii) be in the agency’s “control … at the time the FOIA request is made.” *Id.* at 144-45. Of particular relevance to the case at bar, the Court hewed to the analysis in *Kissinger* by explaining that sufficient control under the second prong “mean[s] that the materials have come into the agency’s possession in the legitimate conduct of its official

duties.” *Id.* at 145. Thus, considering the FOIA request at issue there, the Court held that district court decisions received by the Department of Justice while litigating tax cases were agency records; although the Department of Justice did not internally generate the decisions, they had received and possessed them at the time of the FOIA request at issue. *Id.* at 146-47.

ii. The D.C. Circuit’s Decision: *Judicial Watch*

In *Judicial Watch, Inc. v. United States Secret Service*, the D.C. Circuit considered a FOIA claim mirroring the one at bar, in which the plaintiffs sought from the Secret Service “[a]ll official visitors logs and/or other records concerning visits made to the White House from January 20, 2009 to [August 10, 2009].” 726 F.3d 208, 214 (D.C. Cir. 2013) (first alteration in original). After explaining the Secret Service’s recordkeeping procedures, and while acknowledging that the circumstances presented “a difficult case,” the court held that WAVES and ACR records “that disclose the kind of information” presented in “documents like the President’s appointment calendar” are not agency records subject to FOIA, while WAVES and ACR records “that reveal visitors to those offices within the White House Complex that are themselves subject to FOIA” would constitute agency records. *See id.* at 233-34.

In reaching its conclusion, the D.C. Circuit first found no dispute that the Secret Service had “obtained” the WAVES and ACR records at issue, thus satisfying the first prong of the test set forth in *Tax Analysts II. Judicial Watch*, 726 F.3d at 217. The case thus turned on whether the Secret Service had sufficient control over the documents to render them agency records. To

answer that inquiry, the D.C. Circuit generally looked to four factors originally announced in the Court of Appeal's decision in *Tax Analysts*, which the Supreme Court later affirmed, albeit on different grounds. *Id.* at 218 (discussing *Tax Analysts v. U.S. Dep't of Justice* ("*Tax Analysts I*"), 845 F.2d 1060 (D.C. Cir. 1988), and collecting D.C. Circuit cases applying the four-factor test). These four factors consist of the following:

[i] the intent of the document's creator to retain or relinquish control over the records; [ii] the ability of the agency to use and dispose of the record as it sees fit; [iii] the extent to which agency personnel have read or relied upon the document; and [iv] the degree to which the document was integrated into the agency's record system or files.

Id. (quoting *Tax Analysts I*, 845 F.2d at 1069).

Applying these factors produced an equivocal result. The first factor weighed in the Secret Service's favor in light of the 2006 MOU, which as discussed above expressed the intention of the Secret Service and the White House to place WAVES and ACR records under the control of the White House rather than the Secret Service. *Judicial Watch*, 726 F.3d at 218. The second factor, considering the Secret Service's authority to use and dispose of the records, weighed in neither party's favor; although the Secret Service used the records to vet potential White House visitors and verify their identities, it had a "longstanding practice" of turning those records over to the White House and the 2006 MOU further restricted the Secret Service's ability to use and dispose of the records as it pleased. *Id.* at 218-19. The third factor, assessing the extent of the Secret Service's reliance on the records, indicated Secret Service

control, as the agency used the records to vet and verify the identity of White House visitors “without restriction.” *Id.* at 219. And the fourth factor, taking into account the degree to which the records were integrated into the Secret Service’s systems or files, was found by the D.C. Circuit to weigh in favor of neither party; the Court acknowledged that the records were in the Secret Service’s system at least at one point, but the physical servers on which the records were stored were located in the White House Complex and the records were removed from those servers within 60 days. *Id.* at 219-20.

Having found that only two of the four factors yielded decisive answers — and even then pointed in different directions — the Court drew parallels to another line of cases, one involving “documents that an agency has either obtained from, or prepared in response to a request from, a governmental entity not covered by FOIA: the United States Congress,” where the four-factor “test does not apply[.]” *Judicial Watch*, 726 F.3d at 221. In those cases, courts consider “special policy considerations,” which in the context of WAVES and ACR records suggested that such records would not fall within the scope of FOIA. *Id.* at 220-21 (quoting *Paisley v. C.I.A.*, 712 F.2d 686, 693 n.30 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (1984)). As in the context of FOIA requests for congressional records obtained by an agency, the Court noted that it should defer to an “affirmatively expressed intent” to control such documents, which the White House had expressed toward the WAVES and ACR records. *Id.* at 221 (quoting *Paisley*, 712 F.3d at 693 n.30). And more importantly, subjecting these records to FOIA would force the President

to “either ‘surrender [his] constitutional prerogative of maintaining secrecy’ regarding his choice of visitors (and therefore of outside advisors), or to decline to cooperate with the executive branch agency entrusted with (and necessary for) his personal protection.” *Id.* at 224 (quoting *United We Stand Am., Inc. v. I.R.S.*, 359 F.3d 595, 599 (D.C. Cir. 2004)).

As a “more fundamental” reason for denying FOIA coverage for the WAVES and ACR records, the D.C. Circuit discussed the separation-of-powers issues that such a state of affairs would precipitate. *Judicial Watch*, 726 F.3d at 224.¹³ Relying on *Kissinger*, the Court explained that it was “undisputed” that a FOIA plaintiff could “not obtain the appointment calendars (or visitor logs)” of individuals within the Office of the President, as such documents “are simply not ‘agency records’ as FOIA defines the term.” *Id.* at 225. Thus, although the Secret Service is subject to FOIA, it effectively replicated the schedules of the individuals in the Office of the President through its recordkeeping practices. As *Kissinger* made clear, Congress intentionally excluded the President’s documents from FOIA, and a FOIA request should not act as a tool to obtain indirectly what it may not obtain directly. *Id.*

The canon of constitutional avoidance also weighed against holding for the *Judicial Watch* plaintiffs. *See generally Clark v. Martinez*, 543 U.S. 371,

¹³ Although communications between the White House and the Secret Service constitute *intra*-branch communications, *Judicial Watch* recognized that this dynamic does not lessen the separation-of-powers issues involved. 726 F.3d at 224. Indeed, in comparison to *inter*-branch communications between Congress and agencies subject to FOIA, Congress would have the option to amend FOIA so as to avoid any such dilemma. “No such solution is available to the President if Congress, in enacting FOIA, authorized an intrusion into the confidentiality of his communications.” *Id.*

381 (2005) (stating that the canon of constitutional avoidance “is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts”). As a practical matter, the Court reasoned, applying FOIA to the records at issue “could substantially affect the President’s ability to meet confidentially with foreign leaders, agency officials, or members of the public,” and supporting such an application of FOIA would therefore permit a congressional incursion on the President’s constitutional prerogatives. *Judicial Watch*, 726 F.3d at 226-27. In other words, interpreting FOIA in this manner could present the issue of whether Congress exceeded its constitutional power over the executive branch, a worrisome outcome of which Congress was aware when excluding Presidential advisors from FOIA. See *id.* at 227 (discussing H.R. Rep. No. 93-1380, at 232 (Conf. Rep.)).

Finally, the D.C. Circuit considered the PRA to provide a more natural fit for WAVES and ACR records. The PRA requires the United States to preserve “complete ownership, possession, and control of Presidential records,” 44 U.S.C. § 2202, and it defines “Presidential records” to include documents “created or received by the President,” his “immediate staff,” or individuals in the EOP “whose function is to advise or assist the President,” and to exclude “official records of an agency” as defined under FOIA, § 2201(2). While noting that “Congress did not intend the PRA to diminish the scope of FOIA,” *Judicial Watch*, 726 F.3d at 228 (citing 44 U.S.C. § 2201(2)(B)), the Court reasoned that

the records at issue tracked more closely the definition of presidential records in the PRA, which “gives the President ‘virtually complete control’ over such records while in office, *id.* (quoting *Armstrong v. Bush*, 924 F.2d 282, 290 (D.C. Cir. 1991)). For these reasons, the D.C. Circuit squarely held for the Government.

2. The Court Adopts the Approach of *Judicial Watch*

The Court finds the reasoning in *Judicial Watch* to be persuasive, and therefore proceeds from the premise that it will adopt the D.C. Circuit’s approach unless Plaintiffs provide compelling countervailing reasons. As discussed herein, Plaintiffs have not done so.

In urging the Court to depart from *Judicial Watch*, Plaintiffs take issue with the four-factor test that the D.C. Circuit applied to determine whether an agency has sufficient control over materials to render those materials agency records. (See Pl. Opp. 7-14). Specifically, Plaintiffs argue that this test is inconsistent with the Supreme Court’s framework for determining such control under *Tax Analysts II*. This Court disagrees.

Preliminarily, the Court observes that the outcome in *Judicial Watch* was driven more by “special policy considerations” related to the prospect of applying FOIA to Presidential documents than by the four-factor test for control with which Plaintiffs take issue. *Judicial Watch*, 726 F.3d at 220-21. Indeed, as discussed above, that test’s indeterminate findings provided the *Judicial Watch* Court with little guidance in deciding the issue. Nevertheless, the Court will address Plaintiffs’ arguments.

Plaintiffs hone in on a discussion in *Tax Analysts II* that rejected the notion that “the intent of the creator of a document relied upon by an agency” should determine whether material is an agency record subject to FOIA, reasoning that “[s]uch a *mens rea* requirement is nowhere to be found in the Act.” 492 U.S. at 147. In Plaintiffs’ view, this proposition wholly undermines the D.C. Circuit’s focus on “the intent of [a] document’s creator to retain or relinquish control over the records.” *Judicial Watch*, 726 F.3d at 218 (quoting *Tax Analysts I*, 845 F.2d at 1069). But these statements of law are reconcilable: In the discussion above from *Tax Analysts II*, the Court was responding to an argument by the Department of Justice that would “limit ‘agency records,’ at least where materials originating outside the agency are concerned, ‘to those documents prepared substantially to be relied upon in agency decisionmaking.’” 492 U.S. at 147. The Court was thus considering an issue separate and apart from whether a document’s creator intended “to retain or relinquish control” of the document.

Perhaps more importantly, the intent of a document’s creator in retaining or relinquishing control over the document accords with *both* the Supreme Court *and* the Second Circuit’s analysis in FOIA cases. In *Kissinger*, for instance, the Supreme Court did not blind itself to Henry Kissinger’s demonstrated intent to retain control over notes of his phone calls. *See* 445 U.S. at 140-41, 157 (holding that Kissinger’s records did not become subject to FOIA when he stored them in his State Department office and considering his efforts to determine whether the documents were “agency records”). And the

Second Circuit has similarly looked to the President's intent in determining whether a governmental entity created in part by the President is an agency subject to FOIA.

In *Main Street Legal Services, Inc. v. National Security Council*, the Second Circuit held that the National Security Council System, parts of which were created by statute and other parts of which were created by presidential directive, was not an agency subject to FOIA based in part on the President's intentions as expressed in a presidential directive. 811 F.3d 542, 544-45, 553 (2d Cir. 2016). The court reasoned that "separation of powers ... counsels a respectful measure of deference to the President's own statements of intent," and the presidential directive did not "indicate[] any intent to transfer presidential authority so that it c[ould] be exercised [by the National Security Council System] independent of the President." *Id.* at 558-59. The case law to which this Court is bound therefore supports consideration of the drafter's intent in determining whether a document is an agency record subject to FOIA.

As to *Judicial Watch*'s remaining three factors, Plaintiffs concede that they "are certainly *relevant* to whether an agency has" sufficient control over materials to render them subject to FOIA (Pl. Opp. 10), but argue that the D.C. Circuit's application of those factors goes beyond the Supreme Court's definition of "control" as "hav[ing] come into the agency's possession in the legitimate conduct of its official duties," *Tax Analysts II*, 492 U.S. at 145. The Court declines to adopt Plaintiffs' restrictive reading of *Tax Analysts II*.

Plaintiffs contend that a “strict application” of the second factor — “the ability of the agency to use and dispose of the record as it sees fit,” *Judicial Watch*, 726 F.3d at 218 (quoting *Tax Analysts I*, 845 F.2d at 1069) — would render two of the nine enumerated FOIA exemptions superfluous. (See Pl. Opp. 10). Those two exemptions shield materials from disclosure under FOIA if they are either (i) “established by” and “properly classified pursuant to” “an Executive order to be kept secret in the interest of national defense or foreign policy,” 5 U.S.C. § 552(b)(1); or (ii) “specifically exempted from disclosure by statute,” *id.* § 552(b)(3). Plaintiffs’ argument, however, fails to displace the probative value of considering an agency’s ability to use and dispose of a record in determining whether that agency controls such record. Moreover, the D.C. Circuit’s analysis under this factor considers, as a practical matter, how an agency handles particular material to the extent it is authorized to do so, *see, e.g.*, *Judicial Watch*, 726 F.3d at 218-19; this does not mean, as Plaintiffs would have the Court believe, that if an agency’s authorization in this regard were in some way limited, such limitation would render materials exempt from FOIA to the same extent as an Executive Order protecting their secrecy or a specific statutory exemption from disclosure under FOIA.¹⁴

¹⁴ As an example of the broader protections the Government is afforded when claiming an exemption as opposed to maintaining that materials are not agency records recoverable under FOIA, when claiming an exemption, the Government may submit a “*Glomar* response,” which “neither confirms nor denies the existence of documents responsive to the request, and is permissible ‘where to answer the FOIA inquiry [by confirming or denying the existence of responsive documents] would cause harm cognizable under a[] FOIA exception.’” *Ctr. for Constitutional Rights v. C.I.A.*, 765 F.3d 161, 164 (2d Cir. 2014) (alterations in original) (quoting *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009)).

On the topic of FOIA's exemptions, Plaintiffs argue that "even if there is reason to credit 'special policy considerations' when addressing whether congressionally created documents are 'agency records,' as *Judicial Watch* reasoned, "executive prerogatives" are sufficiently protected by FOIA's exemptions,¹⁵ and any further protection for presidential documents would be Congress's responsibility. (Pl. Opp. 11). But this argument puts the cart before the horse. Notwithstanding the applicability of any FOIA exemption, as *Kissinger* recognized, "Congress did not intend for 'the President's immediate personal staff or units in the [EOP] whose sole function is to advise and assist the President' to be 'included within the term 'agency' under the FOIA.'" *Main St. Legal Servs., Inc.*, 811 F.3d at 546 (alteration in original) (quoting *Kissinger*, 445 U.S. at 156). This congressional intent speaks to the inapplicability of FOIA to the President and his immediate staff without regard to any statutory exemptions. For this reason, the Court rejects Plaintiffs' contention that the D.C. Circuit's analysis of agency "control" over materials "is simply inconsistent with FOIA's text and purposes" and would create "an amorphous tenth exemption" to FOIA. (Pl. Opp. 13-14).

Mindful of the analysis in *Kissinger*, the Court also disposes of Plaintiffs' argument that revealing "information *about* the [P]resident" does not raise the same concerns as subjecting the President himself to FOIA. (Pl. Opp. 12

¹⁵ Specifically, Plaintiffs rely on the two exemptions discussed above, as well as an exemption for privileged documents, *see Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 481 (2d Cir. 1999) (discussing 5 U.S.C. § 552(b)(5)), as providing sufficient protection for presidential documents.

(emphasis in original)). This is a rhetorical sleight-of-hand: Surely, if the Supreme Court had shared Plaintiffs' view, it would not have interpreted Congress's intent as carving out from FOIA's definition of an agency the President's immediate staff and advisers. In addition, Plaintiffs' attempt to distinguish "subjecting the *President* to FOIA" from "subjecting *presidential information in the possession of agencies* to FOIA" is unpersuasive. (*Id.* (emphases in original)). Although this difference is certainly relevant to *Tax Analysts II*'s first prong — whether requested materials are "create[d] or obtain[ed]" by an agency — the mere fact of possession would have much less relevance in deciding the second prong — whether that agency had "control" over such materials. 492 U.S. at 144-45.

Finally, Plaintiffs argue that "FOIA routinely is applied to records that reveal presidential decision-making" (Pl. Opp. 12), but none of the examples to which Plaintiffs cite, such as policy directives or redacted memoranda, is as personal to the President as his daily schedule. This differentiation "accords with Kissinger's teaching that the term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency." *Tax Analysts II*, 492 U.S. at 145. Further, without citing to any particular cases, Plaintiffs argue that many federal agencies obtain information from the President and his aides, and that courts treat records generated by such interactions as subject to FOIA, though they may be exempt for other reasons.¹⁶ The Court derives little from

¹⁶ Plaintiffs provide the following examples:

Plaintiffs' contention on this point, as it is unable to compare the facts of this case to the abstract examples Plaintiffs have provided. Moreover, Plaintiffs' argument is not without examples to the contrary. *See, e.g., Main St. Legal Servs.*, 811 F.3d at 549-53 (affirming dismissal of FOIA claims seeking records from National Security Council related to drone strikes of United State citizens and foreign nationals on grounds that Council was not "agency" subject to FOIA because its sole statutory function is to advise and assist the President).

Having considered and rejected Plaintiffs' arguments, the Court hereby adopts the D.C. Circuit's approach, as provided in *Judicial Watch*, in determining whether the Secret Service exercises sufficient control over the documents at issue to require disclosure under FOIA. In the following section, the Court explains how developments since *Judicial Watch* have underscored the correctness of that holding.

3. Post-*Judicial Watch* Developments

Since *Judicial Watch*, President Obama's establishment of the Director of White House Information Technology and the 2015 MOU have reinforced the conclusion that WAVES and ACR records are within the control of the White House rather than the Secret Service.

[T]he [O]ffice of [L]egal Counsel renders legal advice directly to the [P]resident in response to specific requests. The Office of Government Ethics renders ethics advice related to prospective White House employees based on information the White House supplies. And the Department of Defense implements direct presidential orders relating to, among other things, the use of drone strikes to kill individuals abroad.

(Pl. Opp. 13).

First, the White House’s intention to retain control over WAVES and ACR records is manifest in the relevant memoranda. The Memorandum establishing the DWHIT provides that its intention is “to maintain the President’s exclusive control of the information resources and information systems provided to the President, Vice President, and EOP.” (Herndon Decl., Ex. A, at 1). Accordingly, the 2015 MOU states that “[a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP” — which include WAVES and ACR records — “shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component.” (*Id.*, Ex. B, at § 3.01; *see* Herndon Decl. ¶ 9). As discussed above, this intention weighs in favor of finding that the WAVES and ACR records are not agency records subject to FOIA, and in determining whether to command disclosure of documents under FOIA, “separation of powers further counsels a respectful measure of deference to the President’s own statements of intent[.]” *Main St. Legal Servs.*, 811 F.3d at 558.

Second, pursuant to the White House’s exerted control over the records at issue, the Secret Service “cannot make changes to the [WAVES or EFACS] systems, or make purchases related to the systems, without the consent of the DWHIT.” (Herndon Decl. ¶ 8). In addition, pursuant to the 2015 MOU, the Secret Service’s access to the records is “limited … as necessary to perform its protective functions,” and “once a visit is concluded,” the Secret Service “may not access EFACS or WAVES records without White House Approval.” (*Id.* at

¶ 9). These considerations, and particularly the later restriction on the Secret Service, compel a finding that the White House (rather than the Secret Service) controls the WAVES and ACR records, as they indicate that the Secret Service's ability to utilize and dispose of these records is subject to constraints imposed by the White House that were not present at the time that the D.C. Circuit decided *Judicial Watch*. Cf. 726 F.3d at 218-19.

Thus, the Court holds that WAVES and ACR records are not agency records subject to disclosure under FOIA. Having adopted the D.C. Circuit's approach articulated in *Judicial Watch*, however, the Court must address an additional wrinkle: Certain components within the EOP *are* subject to FOIA, and, as explained in the following section, so are records of visits to such components.

4. Records Involving EOP Components That Are Subject to FOIA

In *Judicial Watch*, the Court delineated a subcategory of WAVES and ACR records to which its holding did not apply: Components of the EOP that are agencies for the purposes of FOIA ("EOP Agency Components") and whose records are thus subject to disclosure under FOIA. 726 F.3d at 232. Here, Defendants contend that the 2015 Presidential Memorandum creating the DWHIT and the 2015 MOU undermine this portion of *Judicial Watch*, and even if not, that Defendants are unable to segregate records of visits to EOP Agency Components from EOP components that employ members of the President's immediate staff whose "sole function" is to "advise and assist the President."

Kissinger, 445 U.S. at 156. (See Def. Br. 32). Defendants' arguments miss the mark.

An EOP component is an "agency" subject to FOIA if it possesses "substantial independent authority in the exercise of specific functions" rather than the "sole function ... to advise and assist the President[]." *Main St. Legal Servs.*, 811 F.3d at 547 (quoting *Soucie v. David*, 448 F.2d 1067, 1075 (D.C. Cir. 1971)). The creation of the DWHIT and terms of the 2015 MOU do not speak to this analysis, and the Court therefore dismisses out of hand Defendants' assertion that such developments undermine *Judicial Watch*'s determination that records of visits to EOP Agency Components are subject to disclosure under FOIA. Although the Secret Service does not exert sufficient control over WAVES and ACR records of visits to the President or EOP components that advise and assist the President, the reasoning underlying that conclusion does *not* extend to WAVES and ACR records of visits to members of EOP components that are themselves subject to FOIA.¹⁷

As to Defendants' contention that they are unable to segregate records of visits to EOP Agency Components, Defendants admit that "[i]n most cases" a WAVES record will contain the email address of the individual scheduling a visit that "will provide an indication of whether the person making the

¹⁷ The parties do not address which EOP components, specifically, are subject to FOIA. Although *Judicial Watch* indicated that OMB, CEQ, ONDCP, USTR, and OSTP are EOP Agency Components, that conclusion was based on sources that either are not binding or, in the case of a former White House website including a list of units covered by FOIA, no longer available. See 726 F.3d at 233 n.28. In any event, the Court need not decide the issue for the purposes of the instant motion.

appointment is employed by” an EOP Agency Component or an EOP component that is not subject to FOIA. (Def. Br. 24). According to Defendants, this information does not indicate with certainty whether such visit implicated an EOP component that is not subject to FOIA. (*Id.*). But such an assertion proves too much, as the Court will not hold that material ceases to be an agency record because of information that it does not contain. Indeed, the lack of any indication that a visit implicated the President or an EOP component involved in advising and assisting the President should lessen Defendants’ concerns regarding revealing the President’s schedule and related information.

To the extent that any WAVES or ACR record from an EOP Agency Component contains information that would not constitute agency records in light of its connection to the President, Defendants may redact such information. Indeed, FOIA “expressly authorize[s]” redaction and places the burden on “the agency when it seeks to justify the redaction of identifying information in a particular document as well as when it seeks to withhold an entire document.” *Associated Press v. U.S. Dep’t of Def.*, 554 F.3d 274, 284 (2d Cir. 2009) (quoting *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 173-74 (1991)). Moreover, if disclosure of records from an EOP Agency Component threatened the President’s security, it would likely be exempt from FOIA. *See Judicial Watch*, 726 F.3d at 233 (citing as an example 5 U.S.C. § 552(b)(7)(F), which “exempt[s] records compiled for law enforcement purposes whose production ‘could reasonably be expected to endanger the life or physical safety of any individual’”). In short, WAVES and ACR records of visits to EOP Agency

Components are agency records subject to FOIA. The Court next considers records of visits to President Trump's Mar-a-Lago residence.

5. Records of Presidential Visitors at Mar-a-Lago

The Court's analysis of this category of records proceeds in two stages: *First*, the Court considers the adequacy of Defendants' search for records responsive to Plaintiffs' FOIA request, and *second*, the Court considers the propriety of Defendants' withholding of two categories of documents.

a. The Adequacy of Defendants' Search

At the time of Plaintiffs' request, the Secret Service's approach to providing security at Mar-a-Lago was "newly developed," and "it was unclear what, if any, record systems or record groupings might exist in regard to who visited the President at Mar-a-Lago, or where such record systems or record groupings might be located." (Campbell Decl. ¶ 9). The Secret Service maintains that the ensuing search resulted in only one "arguably responsive" document that is "not duplicative of information previously made public by the White House" (*id.* at ¶ 14), and that the search also confirmed that "there is no Secret Service system that controls access to Mar-a-Lago, nor is there any grouping, listing, or set of records that would reflect Presidential visitors to Mar-a-Lago" (*id.* at ¶ 11).

The Secret Service has provided an affidavit detailing its search for responsive records. Early on in its search, the Secret Service identified three offices as potentially holding responsive documents:

the Office of Strategic Intelligence and Information (SII), which oversees the Protective Intelligence Division (PID).

This office conducts background checks pursuant to a sensitive security program;

the Office of Investigations (INV), which oversees the Miami Field Office (FO) and the West Palm Beach Resident Office (RO). These offices would most likely have involvement in President Trump's visits to Mar-a-Lago as they are geographically located in proximity to Mar-a-Lago; and

the Office of Protective Operations (OPO), which oversees the Presidential Protective Division (PPD). This is the division with direct operational responsibility for the protection of the President of the United States, including when the President is at Mar-a-Lago.

(Campbell Decl. ¶ 16). A search of the first office resulted in no responsive documents, while a search of each of the latter two offices indicated "that an individual visited with the President at Mar-a-Lago during the time period January 20 to March 8, 2017"; any "potentially responsive documents" proceeded to "further responsiveness review." (*Id.* at ¶¶ 17-19).

Separately, the Office of the Chief Information Officer ("CIO") searched the email accounts of employees within the PPD, Dignitary Protective Division, as well as the Miami FO and West Palm Beach RO. (Campbell Decl. ¶ 20). The CIO carried out this search by applying a series of search terms to the body, subject line, or attachment of any email, for the period January 20 to March 8, 2017, contained in a database of any emails "sent, received, or deleted by all Secret Service employees including during the time period at issue in this case." (*Id.*). Any responsive emails proceeded to "further responsiveness review." (*Id.*).¹⁸

¹⁸ The search terms consisted of the following:

All responsive records from these searches were aggregated, and any duplicate emails were electronically removed, leaving “[o]ver four thousand e-mails and documents” for further responsiveness review. (Campbell Decl. ¶¶ 21-22). Any materials that were “merely copies of media reports concerning Presidential visits to Mar-a-Lago” were removed “as non-responsive, as [they were] not considered [] Agency record[s] of a Presidential visit, and [were] as available to the public as to the Secret Service.” (*Id.* at ¶ 23). Further winnowing down the universe of responsive documents, the parties agreed “that the Secret Service need not produce records regarding Presidential family members, cabinet members, and White House staff who were present at Mar-a-Lago,” as well as “the names of local law enforcement and support personnel scheduled to have their photographs taken with the President.” (*Id.* at ¶¶ 24-25).

After refining the documents in that manner, “the largest remaining category of records” consisted of documents related to Prime Minister Abe’s visit to Mar-a-Lago. (Campbell Decl. ¶ 26). These included “operational records” regarding the Secret Service’s security for the Prime Minister’s visit. (*Id.*). Aside from this category of documents, the search yielded “only a handful of records” referring to persons scheduled to meet with the President at

MAL **OR** Mar-a-Lago **OR** Mar a Lago **AND** at least one of the following terms: guest **OR** appointment **OR** visitor **OR** meet **OR** meeting **OR** clear **OR** cleared **OR** sweep **OR** swept **OR** checkpoint **OR** check point **OR** check **OR** [abbreviation for sensitive security program] **OR** background.

(Campbell Decl. ¶ 20 (brackets and emphases in original)).

Mar-a-Lago. (*Id.* at ¶ 27). The following section considers the content of these records; here, the Court considers the antecedent issue of the adequacy of the search.

To prevail on a summary judgment motion in a FOIA case, the defending agency bears the burden of establishing the adequacy of its search, and it may satisfy this burden by submitting “[a]ffidavits or declarations supplying facts indicating that the agency has conducted a thorough search[.]” *Long v. Office of Pers. Mgmt.*, 692 F.3d 185, 190-91 (2d Cir. 2012) (quoting *Carney v. U.S. Dep’t of Justice*, 19 F.3d 807, 812 (2d Cir. 1994)). Agency affidavits are presumed to be made in “good faith,” but must show that the agency’s search was “‘reasonably calculated’ to produce documents responsive to the FOIA request.” *Seife v. U.S. Dep’t of State*, 298 F. Supp. 3d 592, 607 (S.D.N.Y. 2018) (quoting *Garcia v. U.S. Dep’t of Justice, Office of Info. and Privacy*, 181 F. Supp. 2d 356, 366 (S.D.N.Y. 2002)). “The adequacy of a search is not measured by its results, but rather by its methods,” and therefore, “a search is not inadequate merely because it does not identify all responsive records.” *N.Y. Times Co. v. U.S. Dep’t of Justice*, 756 F.3d 100, 123-24 (2d Cir.), *opinion amended on denial of reh’g*, 758 F.3d 436 (2d Cir. 2014), *supplemented*, 762 F.3d 233 (2d Cir. 2014).

Based on the affidavit provided by the Secret Service, the Court finds the search adequate. Because the Secret Service had not established a formal recordkeeping system at the time of Plaintiffs’ FOIA request, the search began by identifying the offices that could potentially possess responsive documents.

Plaintiffs' argument that Defendants' search was inadequate because the affidavit detailing the search failed to "explain why it was reasonable to look only at records from specific components of" the SII, INV, OPO (Pl. Opp. 24) is simply wrong, because the affidavit provides such explanations: The PID, under the auspices of the SII, "conducts background checks pursuant to a sensitive security program"; the Miami FO and West Palm Beach RO, which are overseen by the INV, "would most likely have involvement in President Trump's visits to Mar-a-Lago as they are geographically located in proximity to Mar-a-Lago"; and the PPD, which the OPO oversees, has "direct operational responsibility for the protection of the President ... , including when the President is at Mar-a-Lago." (Campbell Decl. ¶ 16). These details easily distinguish this case from those on which Plaintiffs rely. *Cf. Aguiar v. Drug Enf't Admin.*, 865 F.3d 730, 739 (D.C. Cir. 2017) (holding agency search inadequate where declarations describing search did "not explain why the only reasonable place to look for" requested materials was in one record system); *Rodriguez v. Dep't of Def.*, 236 F. Supp. 3d 26, 36-37 (D.D.C. 2017) (denying summary judgment where court could not "fathom any legitimate reason for the location limitation" that agency imposed on its search). And in addition to the paper and electronic records that the Secret Service searched within these offices, it also searched emails through the CIO. The Court finds these efforts as a whole to be reasonably calculated to identify any responsive documents.

Plaintiffs' second line of argument contends that the search terms that the Secret Service utilized were underinclusive, in that they did not contain

certain terms that Plaintiffs would have included and also failed to include variants of certain terms that effectively narrowed the search. (See Pl. Opp. 25-26). Yet this challenge amounts to precisely the sort of nit-picking that courts have rejected in the FOIA context. An agency's "burden [is] to show that its search efforts were reasonable and logically organized to uncover relevant documents; it need not knock down every search design advanced by every requester." *DiBacco v. U.S. Army*, 795 F.3d 178, 191-92 (D.C. Cir. 2015) (citing *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991)); *see also Liberation Newspaper v. U.S. Dep't of State*, 80 F. Supp. 3d 137, 146-47 (D.D.C. 2015) ("Where the search terms are reasonably calculated to lead to responsive documents, the Court should not 'micro manage' the agency's search." (citing *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 776 (D.C. Cir. 2002))). The Secret Service's search terms here were reasonably calculated to identify records responsive to Plaintiffs' FOIA request, and the Court will not second-guess the formulation of those terms.

Finally, Plaintiffs contend that media reports indicate that Defendants' search should have yielded more results with respect to presidential visitors at Mar-a-Lago. (See Pl. Opp. 26-28). But this, too, is a line of reasoning that courts have rejected. Even assuming the accuracy of the reports to which Plaintiffs cite, as mentioned above, the proxy for the adequacy of an agency's search is its *methodology*, not its results. *See N.Y. Times Co.*, 756 F.3d at 123-24. The Court therefore refuses to find the search at bar inadequate based on Plaintiffs' supposition as to what the search should have produced.

Because the Court finds the Secret Service's selection of offices along with the CIO email database and the search terms employed to be reasonable, the Court awards Defendants summary judgment as to Plaintiffs' claim that the search at issue was inadequate.

b. The Propriety of Defendants' Withholdings

In response to Plaintiffs' request for documents related to presidential visits at Mar-a-Lago, Defendants located a variety of documents, none of which is contained in formal recordkeeping systems comparable to the WAVES or EFACS systems, and the vast majority of which Defendants maintain are not subject to disclosure under FOIA. In fact, Defendants considered only one such document to be responsive to Plaintiffs' FOIA request — an email from the State Department to the White House Office and forwarded to the Secret Service listing individuals who would accompany the Japanese Prime Minister to Mar-a-Lago. (Def. Br. 10-11).¹⁹ Defendants withheld the remainder of the documents, maintaining that they were either (i) "Presidential schedules or information directly relating to Presidential schedules" provided from the White

¹⁹ More specifically, the Secret Service describes the email as

an e-mail from the Department of State, Office of the Chief of Protocol, that was sent to the White House Office and forwarded to the Secret Service, providing a listing of the names of individuals (and their titles or job responsibilities) who would be accompanying the Prime Minister of Japan and his wife during their visit to Mar-a-Lago.

(Campbell Decl. ¶ 28(xii)). Within this document, the Secret Service withheld "the name and email address of one EOP employee, and the names, certain e-mail addresses, and one cell phone number of non-visitor third parties." (Campbell Decl. ¶ 37). In support of this withholding, the Secret Service invokes FOIA exemptions 6, for protection of "personal privacy," 5 U.S.C. § 552(b)(6), and 7(C), for protection of "records or information compiled for law enforcement purposes," § 552(b)(7)(C). (See Def. Br. 27-28). Plaintiffs' opposition brief does not challenge this withholding.

House to the Secret Service “for the limited purpose of providing information necessary for the Secret Service to perform its statutory duty to protect the President” and thus not agency records under FOIA,²⁰ or (ii) “operational materials that merely contain a repeated statement that the Prime Minister of Japan and his spouse would be meeting, dining, or present with the President and First Lady at Mar-a-Lago, which had already been publicly released by the White House,” which Defendants consider “non-responsive because they are not records of Presidential visitors at Mar-a-Lago[.]” (*Id.* at 11).²¹

²⁰ These documents consist of the following:

- i. three White House documents, received from the White House Office, titled “Official Travel Schedule, the Visit of the President to Palm Beach, Fl,” for the dates of February 10, 2017, February 11, 2017, and February 12, 2017, respectively ... ;
- ii. a White House document, received from the White House Office, titled “Schedule of the President, Sunday February 21, 2017;”
- iii. an e-mail from the White House Office containing the President’s schedule for February 10, 2017;
- iv. an e-mail from the White House Office containing the White House Chief of Staff’s Schedule, which includes an entry referring to the President’s dinner with the Prime Minister of Japan at Mar-a-Lago on February 10, 2017;
- v. two Secret Service e-mails containing the President’s schedules for February 10, 2017, and February 11, 2017, respectively, obtained from the White House Office; [and]
- vi. three e-mails from the White House Office to [the Presidential Protective Division] each providing specific information concerning the arrival of an individual who was scheduled to meet with the President on February 12 or February 19, and the person(s) accompanying the individual[.]

(Campbell Decl. ¶¶ 28(i)-(vi)).

²¹ These documents consist of the following:

- [i] a Secret Service email containing a “Final Intelligence Situation Report for the visit of President Donald J. Trump . . . to Palm Beach, FL” from February 10-21, 2017, containing the statement that the President and First Lady are traveling to Palm Beach, FL to host the Prime Minister of Japan;
- [ii] a Secret Service intelligence assessment titled “Foreign Dignitary Assessment — Japan,” prepared by the Secret Service’s

As with the WAVES and ACR records considered above, the parties do not dispute that the Secret Service obtained these records. Whether they qualify as agency records subject to FOIA therefore depends on the extent to which the Secret Service, as opposed to the White House, exerted control over them, *Tax Analysts II*, 492 U.S. at 144-45, or whether special policy considerations necessitate removing such documents from FOIA's scope, *Judicial Watch*, 726 F.3d at 220-21. The Court considers Defendants' categorical withholdings in turn.

[Protective Intelligence Division] for the visit of Prime Minister Abe, containing the statement that the Prime Minister will meet with the President at Mar-a-Lago;

[iii] a letter from the Secret Service to the Federal Bureau of Investigation (FBI), advising that the President and First Lady would be visiting the FBI's West Palm Beach Resident Office district on February 10-12, 2017, and noting that the Prime Minister of Japan and Spouse will stay as guests of President Trump at the Mar-a-Lago Club;

[iv] a Secret Service document titled "Special Operations Division (SOD) Joint Tactical Survey" for the visit of President Donald Trump and family to Palm Beach, Florida, February 10-12, 2017, containing two references to the fact that the President will be hosting and meeting with the Prime Minister of Japan and Spouse at Mar-a-Lago; [and]

[v] seven internal Secret Service e-mails containing or forwarding Secret Service operational, scheduling, reporting, or Presidential or other event information, including Presidential scheduling information obtained from the White House Office, and each containing a notation that the Prime Minister of Japan would be meeting or dining with the President at Mar-a-Lago[.]

(Herndon Decl. ¶¶ 28(vii)-(xi)).

i. The Presidential Schedule Documents

Defendants refer to the first category of withheld documents as “Presidential Schedule Documents.” (Def. Br. 20-23). The Court understands by way of background that a member of the White House transmits the Presidential Schedule Documents to the Secret Service on a nightly basis by “upload[ing] the schedule to an EOP web portal,” which generates an automated email to certain members of the Secret Service. (Murray Decl. ¶ 22). The White House provides access to the web portal and the automated emails to “a limited number of Secret Service personnel with an operational need to know the scheduling information.” (*Id.*). To acquire this privilege, a Secret Service member must request the access from the White House and obtain approval. (*Id.* at ¶ 23). Secret Service members who receive the Presidential Schedule Documents utilize the records “solely to fulfill [their] operational needs,” and the White House similarly provides these records “solely for the limited purpose of allowing the Secret Service to perform its statutory duty to protect the President, Vice President and other protectees, as well as the White House Complex.” (*Id.* at ¶ 24). Defendants urge the Court to extend the rationale behind *Judicial Watch* to encompass these documents, thereby moving them outside of FOIA’s scope for failing to qualify as agency records. The Court agrees with Defendants’ position.

The considerations that render FOIA inapplicable to WAVES and ACR records apply with equal force to the Presidential Schedule Documents. The White House’s intent to control these documents is apparent from its selective

disclosure only to approved Secret Service members. Moreover, these handpicked Secret Service members had no part in creating the documents, but only passively received them from the White House.

To be sure, the Court does not read the 2015 MOU, along with its requirements for the use and disposal of WAVES and ACR records, as applying to the Presidential Schedule Documents, and Defendants do not so contend. Nor does the Court doubt that the Secret Service members who receive these documents rely on them to carry out their statutory duty to protect the President. (See Murray Decl. ¶ 22 (“The Secret Service relies on information regarding the President’s schedule that is provided by the White House Office to fulfill its protective mission.”)). But these differences do not assuage the Court’s concerns that exposing these documents to disclosure under FOIA would produce the same problems as applying FOIA to WAVES and ACR records.

Further, the same separation-of-powers concerns that animated *Judicial Watch* apply here. Just as “the Secret Service must monitor and control access to the building in which the President lives and works,” which “requires presidential staff to request access [from the Secret Service] for visitors,” *Judicial Watch*, 726 F.3d at 225, “[t]he Secret Service uses the Presidential [S]chedule [D]ocuments … solely to fulfill its operational needs” (Murray Decl. ¶ 2p). In one sense, subjecting the Presidential Schedule Documents to FOIA would intrude more deeply into the Office of the President than doing so for WAVES and ACR records: whereas the latter would allow “a FOIA requester

effectively [to] receive *copies* of [the President's] calendars," *Judicial Watch*, 726 F.3d at 225 (emphasis added), the former would provide *direct* access to these calendars in their original forms.

In removing the Office of the President from FOIA's scope, Congress surely did not "intend[] to require the effective disclosure of the President's calendars in this roundabout way." *Judicial Watch*, 726 F.3d at 225. The Presidential Schedule Documents also track the definition of "presidential records" in the PRA even more closely than WAVES and ACR records: They are "documentary materials ... created ... by the President, the President's immediate staff, or a unit or individual of the [EOP] whose function is to advise or assist the President, in the course of conducting activities which relate to" the President's "official or ceremonial duties[.]" 44 U.S.C. § 2201(2). And by providing them to the Secret Service, like WAVES and ACR records, "they are essential to ensuring that the President can go about these core activities without risking his security or that of his family and staff." *Judicial Watch*, 726 F.3d at 228.

Plaintiffs counter that adopting Defendants' position would create an "unsustainable rule that documents that merely relate to information about the president's schedule are also, as a matter of law, beyond FOIA's reach." (Pl. Opp. 29). This argument is a straw man. The Court's holding is limited to the documents at issue, consisting of correspondence detailing the President's daily schedule that was transmitted from the White House to a select set of Secret Service members. It does not speak to, or even anticipate, a broader set

of documents than those presented here. The Presidential Schedule Documents are not agency records subject to FOIA, and Defendants properly withheld them.

ii. The Operational Records

The Court next considers Defendants withholding of “a small number of operational records related to the Japanese Prime Minister’s visit that also referred to the fact that the Prime Minister and his spouse were scheduled to meet or dine with the President and First Lady at Mar-a-Lago.” (Def. Br. 29). Defendants maintain that “[t]he only arguably responsive information in these documents is the statement, repeated in each document, that the Prime Minister of Japan and his spouse would be meeting, dining, or present with the President at Mar-a-Lago.” (*Id.*). Thus, Defendants argue, they were not required to disclose these records “only to release a minute amount of already public information” that “is also duplicative of the information contained in the State Department email released to [P]laintiffs.” (*Id.*). Defendants’ position, however, does not have a basis in FOIA.

That the responsive material contained in these documents is relatively slim is of no moment. Information that would be valuable in public discourse may be expansive or contracted; in either case, FOIA expressly provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt[.]” 5 U.S.C. § 552(b). Nor may the Government withhold production of records simply because they are publicly available by other means. “If Congress had

wished to codify an exemption for all publicly available materials, it knew perfectly well how to do so.” *Tax Analysts II*, 492 U.S. at 152-53. And although an agency need not “produce multiple copies of the exact same document,” an agency may not withhold documents based on the fact that the documents merely contain similar statements. *Defs. of Wildlife v. U.S. Dep’t of Interior*, 314 F. Supp. 2d 1, 10 (D.D.C. 2004). Defendants therefore have improperly withheld the operational records and must disclose these materials — subject, as always, to any applicable FOIA exemptions.

C. Defendants’ Motion to Dismiss Plaintiffs’ APA Claims Based on the FRA and PRA Is Granted

The Court next considers Defendants’ motion to dismiss Plaintiffs’ APA claims that seek judicial review, under the FRA and PRA, of the 2015 MOU. Specifically, Claim Three alleges that the EOP “enter[ed] into an MOU that declares that the records of visits to agency components of the EOP are under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component,” which violated the EOP’s “mandatory, non-discretionary obligation under the FRA and the PRA to treat [WAVES and ACR records] as agency records of DHS subject to the FOIA.” (Am. Compl. ¶ 63). Similarly, Claim Four alleges that by entering the same MOU, “DHS violated its mandatory, non-discretionary obligation under the FRA to treat and manage these records as agency records of DHS subject to FOIA.” (*Id.* at ¶ 67).

Defendants seek dismissal of these claims for lack of subject matter jurisdiction and failure to state a claim. In addressing Defendants’ motions, the Court first summarizes the law relevant to Plaintiffs’ claims based on the FRA

and PRA. It then considers the specifics of Defendants' motion. Because the Court grants Defendants' motion on jurisdictional grounds, it does not — as it may not without a proper jurisdictional basis — consider Defendants' motion to dismiss for failure to state a claim.

1. Applicable Law

“A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it.” *Lyons v. Litton Loan Servicing LP*, 158 F. Supp. 3d 211, 218 (S.D.N.Y. 2016) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). In resolving a Rule 12(b)(1) motion, “the district court must take all uncontested facts in the complaint … as true, and draw all reasonable inferences in favor of the party asserting jurisdiction.” *Fountain v. Karim*, 838 F.3d 129, 134 (2d Cir. 2016) (quoting *Tandon v. Captain’s Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014)). “A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.” *Id.* (quoting *Makarova*, 201 F.3d at 113).

2. The FRA and the PRA

As with the FOIA claims in this case, the parties’ briefing on these claims focuses on cases from the D.C. Circuit (see Def. Br. 30-35; Pl. Opp. 32-35), and the Court’s independent research confirms that courts within the D.C. Circuit, to the near exclusion of any others, provide the little case law that illuminates the statutes at issue. Two D.C. Circuit cases in particular provide a framework for evaluating the justiciability of Plaintiffs’ claims: *Armstrong v. Bush*

(“*Armstrong I*”), 924 F.2d 282 (D.C. Cir. 1991), and *Armstrong v. Executive Office of the President, Office of Administration* (“*Armstrong II*”), 1 F.3d 1274 (D.C. Cir. 1993) (per curiam). Given the dearth of binding case law on the issues presented by Plaintiffs’ claims, along with the lack of any dispute by the parties as to the persuasive value of these cases, the Court shall adopt the analytical structure that these cases provide for the purpose of ruling on Defendants’ motion.

a. General Statutory Schemes

The FRA is composed of a collection of statutes that govern the creation, management, and disposal of records held by agencies of the federal government. *See* 44 U.S.C. §§ 2102-2118, 2901-2910, 3101-3107, 3301-3324; *Armstrong I*, 924 F.2d at 284 n.1. The FRA requires the head of every federal agency to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency[.]” 44 U.S.C. § 3101. Under the FRA, agency heads must also establish “an active, continuing program for the economical and efficient management of the records of the agency” and “safeguards against the removal or loss of records[.]” *Id.* §§ 3102, 3015. “No records may be ‘alienated or destroyed’ except pursuant to the disposal provisions of the FRA.” *Armstrong I*, 924 F.2d at 285 (quoting 44 U.S.C. § 3314).

Under the FRA, the Archivist of the United States is directed to further the mission of these agency heads by assisting agencies in proper record

disposition, issuing “standards, procedures, and guidelines” regarding record management, and evaluating the records and recordkeeping systems and practices of the federal agencies. *See* 44 U.S.C. §§ 2904(a), 2904(c)(1). If the Archivist discovers any FRA violations by an agency, he or she must first notify the offending agency and recommend a curative measure. *See id.* § 2115(b)). If the agency fails to cure the violation in a timely and satisfactory manner, the Archivist must report the issue to the President and Congress. *See id.*

The Archivist’s role in enforcing the FRA also entails, if the Archivist learns of any “actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in the custody of [an] agency,” to “notify the agency head of the problem and assist the agency head in initiating an action through the Attorney General for the recovery of wrongfully removed records or for other legal redress.” *Armstrong II*, 1 F.3d at 1280 (alteration in original) (quoting § 2905(a)). If the agency head fails to seek legal recourse, the Archivist must request that the Attorney General take such action and notify Congress of the request. *Id.* (citing § 2905(a)).

In contrast to the FRA, the PRA governs the maintenance and disposal of “Presidential records.” 44 U.S.C. § 2201(2). In enacting the PRA, “Congress sought to establish the public ownership of presidential records and ensure the preservation of presidential records” while “minimiz[ing] outside interference with the day-to-day operations of the President and his closest advisors and” ensuring “executive branch control over presidential records during the President’s term in office.” *Armstrong I*, 924 F.2d at 290. In furtherance of the

former goal, the PRA requires the President to “take all … steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of the President’s constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are preserved and maintained as Presidential records[.]” 44 U.S.C. § 2203.

The PRA imposes document retention requirements that differ depending on whether a President is currently in office. While in office, “the President may dispose of those Presidential records … that no longer have administrative, historical, informational, or evidentiary value[.]” 44 U.S.C. § 2203(c). “If the Archivist thinks it advisable, he may notify Congress of the President’s intent to dispose of the records; and if the Archivist notifies Congress, the President must submit the disposal schedules to the appropriate congressional committees and wait sixty days before destroying the records.” *Armstrong I*, 924 F.2d at 286 (citing 44 U.S.C. § 2203(c)-(d)). But “neither the Archivist nor the Congress [has] authority to veto the President’s decision to destroy the records.” *Id.* After the President has left office, however, the Archivist assumes control over the presidential records and, after notifying the Federal Register, may dispose of records with “insufficient administrative, historical, informational, or evidentiary value to warrant their continued preservation.” 44 U.S.C. § 2203(g)(1), (4).

b. Availability of Judicial Review

Courts have recognized that neither the FRA nor the PRA — of their own force — affords a private right of action. *See Kissinger*, 445 U.S. at 148-50 (“Congress has not vested federal courts with jurisdiction to adjudicate [violations of the FRA] upon suit by a private party.”); *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 147 (D.C. Cir. 2016) (“[N]either the [FRA] nor the Records Disposal Act contemplate a private right of action for access to or recovery of federal records.”); *Citizens for Responsibility & Ethics in Washington v. Trump*, No. 17 Civ. 1228 (CRC), 2018 WL 1401271, at *7 (D.D.C. Mar. 20, 2018) (“The [PRA] does not itself provide” a cause of action. (citing *Judicial Watch, Inc. v. NARA*, 845 F. Supp. 2d 288, 299 n.5 (D.D.C. 2012); *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 593 F. Supp. 2d 194, 218 (D.D.C. 2009))).

Yet the D.C. Circuit has recognized that federal courts have jurisdiction to engage in limited review, under the APA, of agency compliance with the FRA.²² *Armstrong I* held that a private plaintiff may seek review under the APA of an agency’s “recordkeeping guidelines and directives,” in order to determine whether they “are inadequate because they permit the destruction of ‘records’ that must be preserved under the FRA.” 924 F.2d at 291. Conversely, the

²² The APA does not provide an independent basis of federal jurisdiction, but “waives the federal government’s sovereign immunity in actions” invoking federal question jurisdiction. *Lunny v. United States*, 319 F.3d 550, 557-58 (2d Cir. 2003). As relevant to the D.C. Circuit’s analysis of the FRA, “[a] court’s jurisdiction to enforce the APA is limited ... when a statute ‘preclude[s] judicial review,’ or the agency decision being challenged ‘is committed to agency discretion by law.’” *Kilani-Hewitt v. Bukszpan*, 130 F. Supp. 3d 858, 862-63 (S.D.N.Y. 2015) (quoting 5 U.S.C. § 701(a)(1), (2)).

Court held that the FRA “preclud[es] private litigants from suing directly to enjoin agency actions in contravention of agency guidelines,” as the FRA’s statutory scheme saved this responsibility for administrative enforcement through a request by the agency head or Archivist to the Attorney General. *Id.* at 294-95.²³ In addition, the Court held that the FRA precludes judicial review of actions “to prevent an agency official from improperly destroying or removing records,” as this too would contravene the FRA’s enforcement scheme. *Id.* at 294.

The D.C. Circuit has recognized even more limited judicial review of compliance with the PRA. In *Armstrong I*, the Court held that “[t]he APA does not authorize judicial review of the President’s compliance with the PRA because the President is not an ‘agency’ within the meaning of the APA and because the PRA precludes judicial review of the President’s *record creation and management decisions.*” 924 F.2d at 297 (emphasis added). In *Armstrong II*, however, it clarified that “the PRA allows limited review to assure that *guidelines defining presidential records* do not improperly sweep in nonpresidential records.” 1 F.3d at 1278 (emphasis added). The Court reasoned that “if guidelines that purport to implement the PRA were not reviewable for compliance with the statute’s definition of presidential records, non-presidential materials that would otherwise be immediately subject to the

²³ The court noted, however, that this conclusion did not mean to preclude “judicial review of the agency head’s or Archivist’s refusal to seek the initiation of an enforcement action by the Attorney General.” *Armstrong I*, 924 F.2d at 295.

FOIA would be shielded from its provisions, whether wittingly or unwittingly, if they were managed as presidential records.” *Id.* at 1293.

The *Armstrong II* Court distinguished “creation, management, and disposal decisions,” which are not subject to judicial review, from “the initial classification of materials as presidential records,” which is subject to judicial review. 1 F.3d at 1294. It further clarified that

[a] “creation” decision refers to the determination to *make* a record documenting presidential activities. Thus, the courts may not review any decisions regarding *whether to create* a documentary presidential record. “Management decisions” describes the day-to-day process by which presidential records are maintained. The courts may likewise not review these particulars of the presidential records management system. Finally, “disposal decisions” describes the process outlined in [the PRA] for disposing of presidential records. Judicial review of the President’s action under these provisions is also unavailable. But guidelines describing which *existing* materials will be treated as presidential records in the first place are subject to judicial review.

Id. at 1294 (internal citations omitted). In sum, “although the PRA impliedly precludes judicial review of the President’s decisions concerning the creation, management, and disposal of presidential records during his term in office, the courts may review guidelines outlining what is, and what is not a ‘presidential record[.]’” *Id.* (internal citation omitted).

The parties agree these cases afford limited judicial review of agency recordkeeping guidelines categorizing records under the FRA and PRA. (See Def. Br. 31, 34; Pl. Opp. 33). But they dispute whether Plaintiffs’ claims are based on a guideline that the Court may review for compliance with the FRA or

PRA. As the following section explains, the Court holds that Plaintiffs fail to allege such a guideline, which leaves the Court without subject matter jurisdiction over these claims.

3. The Complaint Does Not Allege a Guideline That Is Subject to Judicial Review for Compliance with the FRA or PRA

a. Plaintiffs' Claims Are Premised Only on the 2015 MOU

The Court begins by determining which MOU forms the basis of Plaintiffs' claims. Plaintiffs' opposition brief urges the Court to review Defendants' "functional classification of WAVES and ACR records as presidential records" pursuant to the terms of both the 2006 and 2015 MOUs (Pl. Opp. 34), but the operative complaint makes no mention of the 2006 MOU. Indeed, the only citation to any MOU in the Amended Complaint reads as follows:

In its opposition to [a] motion for a temporary restraining order [filed in this case,] the Secret Service relied in part on a 2015 Memorandum of Understanding ("MOU") that, on information and belief, has never before been made public. That MOU states in relevant part: "[a]ll records created, stored, used, or transmitted by, on, or through the unclassified information systems and information resources provided to the President, Vice President, and EOP shall remain under the exclusive ownership control, and custody of the President, Vice President, or originating EOP component." The Secret Service has interpreted this provision as applying to all the records at issue in [a separate] lawsuit.

(Am. Compl. ¶ 50). As mentioned above, the claims at issue go on to reference this provision of the 2015 MOU as violating the EOP's "obligation under the FRA and the PRA to treat [records of presidential visitors] as agency records of

DHS subject to FOIA" (*id.* at ¶ 63), and violating DHS's "obligation under the FRA to treat and manage these records as agency records of DHS subject to the FOIA" (*id.* at ¶ 67). The operative complaint thus does not reference the 2006 MOU.

The Court recognizes that it may refer to evidence outside of the pleadings in ruling on a motion to dismiss for lack of subject matter jurisdiction to resolve factual disputes on which subject matter jurisdiction depends. *See Zappia Middle E. Const. Co. Ltd. v. Emirate of Abu Dhabi*, 215 F.3d 247, 253 (2d Cir. 2000). But where, as here, a defendant mounts a facial challenge to jurisdiction — *i.e.*, a Rule 12(b)(1) motion "based solely on the allegations of the complaint" — the district court's "task ... is to determine whether the [p]leading 'allege[s] facts that affirmatively and plausibly suggest'" that it has jurisdiction. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) (last alteration in original) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011)). Nor can Plaintiffs inject the 2006 MOU into their pleading by way of their opposition brief, as this would constitute an improper amendment of their complaint. *See Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998). The Court will thus confine its analysis to the language above from the 2015 MOU.

b. The FRA and PRA Preclude the Court's Review of the 2015 MOU

The excerpted language of the 2015 MOU on which Plaintiffs' claims are premised is not the sort of guideline or directive that courts have reviewed for compliance with either the FRA or the PRA. In *Armstrong II*, for instance, the

D.C. Circuit found reviewable, for compliance with the FRA, instructions from the EOP and National Security Council (“NSC”) to employees, “that when any electronic document *meets the definition of a federal record*, the employee should either print out the information that appears on her computer screen or incorporate that material into a written memorandum.” 1 F.3d at 1282 (emphasis added). The Court held that this guidance did not comply with the FRA because the hard-copy printouts of the records could omit information that formed “an integral part of the original electronic records[.]” *Id.* at 1278. This outcome accords with the directive announced in *Armstrong I* of limiting judicial review under the FRA to guidelines that would permit the improper destruction of records that should otherwise be preserved. *See* 924 F.2d at 291; *see also*, e.g., *Competitive Enter. Inst. v. U.S. Envtl. Prot. Agency*, 67 F. Supp. 3d 23, 33 (D.D.C. 2014) (holding alleged policy of deleting text messages constituting federal records was subject to judicial review); *Citizens for Responsibility and Ethics in Wash. v. Exec. Office of the President*, 587 F. Supp. 2d 48, 53, 56-58 (D.D.C. 2008) (holding that Automated Records Management System was subject to judicial review where it “automatically captured, preserved and categorized all e-mail sent through the White House e-mail system,’ and separately segregated, categorized and archived records subject to FRA and those subject to” PRA).

As to examples of guidelines subject to review for compliance with the PRA, *Armstrong II* is illuminative. That Court considered an EOP policy that “classif[ied] broad categories of NSC records as federal records,” and declared

that such records “are [p]residential records if they were received or created for the President,” or certain other White House members, thus imposing a definition of “presidential records” not based on the definition found in the PRA. 1 F.3d at 1291. To avoid confusion, the Court provided a hyperbolic example of a guideline that would surely be reviewable as covering an initial classification of documents as presidential records — “a guideline defining ‘presidential records’ as ‘all records produced or received by, or in the possession or under the control of, any government agency or employee of the United States.’” *Id.* at 1293.

As these examples make clear, judicial review for compliance with the PRA extends only to guidelines that categorize materials as presidential records, such that by doing so, an agency may run afoul of the PRA’s definition of “presidential records” and, thus, treat records as presidential when they would otherwise fall within the FRA. *See also, e.g., Cheney*, 593 F. Supp. 2d at 201, 216 (subjecting to judicial review (i) executive order providing that PRA “applies to the executive records of the Vice President,” and (ii) policy under which Vice President, EOP, and Office of Vice President indicated they were “not part of the executive branch” to avoid record preservation under the PRA); *Am. Historical Ass’n v. Peterson*, 876 F. Supp. 1300, 1313-18 (D.D.C. 1995) (holding alleged agreement between former president and former national archivist was subject to judicial review for compliance with PRA where it provided that certain presidential records, as defined under PRA, would be subject to president’s control after leaving office).

Here, Plaintiffs' claims under the FRA and PRA do not contain a sufficient factual basis for the Court's review. The portion of the 2015 MOU excerpted in the Amended Complaint simply states the understanding of the parties to the MOU that certain records "shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component." This section of the MOU thus does not command recordkeeping practices that could result in improper disposal under the FRA, *cf. Armstrong II*, 1 F.3d at 1282; "encompass[] the initial classification of materials as presidential records," *id.* at 1294; or constitute the functional equivalent of such impermissible steps.

As to judicial review for compliance with the FRA, Plaintiffs "challeng[e] the Secret Service's failure to treat the WAVES and ACR records as agency records under the FRA," by transferring those records to the WHORM rather than retaining them. (Pl. Opp. 34). But this practice, rather than constituting a reviewable guideline, is precisely the sort of claim that the FRA, as interpreted by the Supreme Court, has precluded courts from reviewing. As the *Kissinger* Court noted, "the [FRA] establishes only one remedy for the improper removal of a 'record' from the agency: the agency head, in conjunction with the Archivist, is required to request the Attorney General to initiate an action to recover records unlawfully removed from the agency." *Armstrong I*, 924 F.2d at 294 (quoting *Kissinger*, 445 U.S. at 148). Nor do Plaintiffs bring a claim seeking review of an agency head's or the Archivist's

failure to demand enforcement by the Attorney General. *See Armstrong I*, 924 F.2d at 295.

Plaintiffs' claims under the PRA similarly fall short. Plaintiffs argue that through the 2015 MOU, the EOP improperly categorizes WAVES and ACR records as presidential records, and that the Court must be able to review this categorization “[t]o maintain the integrity of the line Congress drew between agency records ... and presidential records[.]” (Pl. Opp. 34). But the MOU does no such thing. By stating that certain documents “shall remain under the exclusive ownership, control, and custody of the President, Vice President, or originating EOP component,” the MOU does not “purport to implement the PRA.” *Armstrong II*, 1 F.3d at 1293. Indeed, it says nothing of whether the parties understand these records to constitute presidential records, and as discussed above, the judicial determination of whether material constitutes an agency record under FOIA, and is thus exempt from the PRA by its own terms, takes into account the drafter’s intent as just one factor among several others. *See* 44 U.S.C. § 2201(2) (defining “Presidential records” as excluding agency records as defined by FOIA). Rather, this portion of the MOU describes which governmental entities will be responsible for such documents on a day-to-day basis. Construing this portion of the MOU as a guideline amenable to review for compliance with the PRA would thus muddy the “narrow, clearly defined limitation on the scope of the PRA” that restrains courts only to consider “guidelines describing which *existing* materials will be treated as presidential records in the first place[.]” *Armstrong II*, 1 F.3d at 1292, 1294.

For all of these reasons, the Court may not review Plaintiffs' claims premised on the FRA and PRA, and Defendants' motion to dismiss for lack of subject matter jurisdiction is granted.

D. Defendants' Motion to Dismiss Plaintiffs' Claim for Declaratory Judgment Is Granted

Having determined that Plaintiffs' claims under the FRA, PRA, and APA fail, and that certain of Plaintiffs' FOIA claims shall proceed, the Court next considers Defendants' motion to dismiss Plaintiffs' claims for declaratory judgment. The issue depends on whether a federal court may award declaratory judgment based solely on a FOIA claim. Plaintiffs do not address the issue, aside from stating that “[t]his case presents an actual and adversarial issue that entitles Plaintiffs to declaratory relief.” (Pl. Opp. 35).

The Declaratory Judgment Act allows a federal court to “declare the rights and other legal relations of any interested party seeking such a declaration” in “a case of actual controversy[.]” 28 U.S.C. § 2201(a). This does not confer a right on the parties to obtain a declaratory judgment, however; whether to award such relief remains within the discretion of the district court.

See Fleisher v. Phoenix Life Ins. Co., 858 F. Supp. 2d 290, 301 (S.D.N.Y. 2012); *Apotex Inc. v. Sanofi-Synthelabo*, 386 F. Supp. 2d 549, 551 (S.D.N.Y. 2005). In determining whether to exercise such discretion, courts consider “[i] whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; and [ii] whether a judgment would finalize the controversy and offer relief from uncertainty.” *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 301, 311 (S.D.N.Y. 2010) (quoting *Duane Reade, Inc. v. St. Paul Fire & Marine*

Ins. Co., 411 F.3d 384, 389 (2d Cir. 2005)). In addition, courts may consider whether the party seeking declaratory judgment has available “a better or more effective remedy.” *Id.* (quoting *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359-60 (2d Cir. 2003)).

Courts have come to varying conclusions as to the propriety of declaratory relief for FOIA claims. One court within the Second Circuit, while declining to grant declaratory relief, has noted that “in the FOIA context, courts have granted declaratory judgment where a plaintiff has shown that an agency engaged in a pattern or practice of delayed disclosure and that it is possible the violations will recur with respect to the same requesters.” *Navigators Ins. Co. v. Dep’t of Justice*, 155 F. Supp. 3d 157, 168 (D. Conn. 2016) (collecting cases outside of the Second Circuit). Similarly, the D.C. Circuit has declared that “FOIA imposes no limits on courts’ equitable powers in enforcing its terms,” which district courts have interpreted to allow declaratory and injunctive relief. *Muttitt v. U.S. Cent. Command*, 813 F. Supp. 2d 221, 227-28 (D.D.C. 2011) (quoting *Payne Enters., Inc. v. United States*, 837 F.2d 486, 494 (D.C. Cir. 1988)).

These courts have limited such relief, however, to circumstances in which bringing an action to enjoin the withholding of records or to compel their production would fail to provide an adequate remedy. *See, e.g., Isiwele v. U.S. Dep’t of Health & Human Servs.*, 85 F. Supp. 3d 337, 352-53 (D.D.C. 2015) (“[T]he ‘comprehensiveness of FOIA’ forecloses any claims purportedly brought also under the APA, the [Declaratory Judgment Act], and the All Writs Act.”

(quoting *Johnson*, 310 F.3d at 777); *Inst. for Policy Studies v. C.I.A.*, 885 F. Supp. 2d 120, 152-53 (D.D.C. 2012) (holding declaratory relief improper because FOIA provided adequate remedy to address alleged FOIA violations). As one court has explained, declaratory relief may be appropriate in a FOIA case, even after the claim becomes moot, either in a challenge to an “isolated agency action” that becomes moot during the litigation because of the agency’s voluntary cessation of wrongful withholding, or in a challenge to “an allegedly illegal agency policy and the future implementation of that policy.” *Swan View Coalition v. Dep’t of Agric.*, 39 F. Supp. 2d 42, 46 (D.D.C. 1999).

The Court declines to exercise its discretion to entertain a declaratory judgment action here. The relief Plaintiffs seek on this front consists of the following: [i] “a declaration that Plaintiff Doyle is entitled to prompt processing and disclosure of the requested records”; [ii] “a declaration that [P]laintiffs are entitled to expedited processing and disclosure of the requested records”; and [iii] “a declaration that all records the Secret Service creates and maintains of visits to agency components of the EOP are agency records of DHS and any MOU to the contrary is unlawful and unenforceable.” (Am. Compl. Request for Relief ¶¶ 2, 4, 6). The Court effectively disposed of the last of these three requests in its ruling on the merits of Plaintiffs’ FOIA claims. And the first two requested declarations would provide no further practical relief than that which Plaintiffs’ FOIA claims seek. Cf. *Isiwele*, 85 F. Supp. 3d at 352-53. Nor have Plaintiffs alleged that Defendants engaged in a pattern or practice of flouting FOIA’s requirements. See *Swan View Coalition*, 39 F. Supp. 2d at 46. The

Court thus grants Defendants' motion to dismiss Plaintiffs' claims for declaratory relief.

CONCLUSION

For the above reasons, Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART, and Defendants' motion to dismiss is GRANTED. Within 60 days of the date of this Opinion and Order, Defendants are directed to disclose any materials responsive to Plaintiffs' FOIA surviving FOIA claims, and the parties are to provide a joint letter to the Court as to how they wish to proceed.

SO ORDERED.

Dated: July 26, 2018
New York, New York



KATHERINE POLK FAILLA
United States District Judge

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KATE DOYLE, NATIONAL SECURITY
ARCHIVE, CITIZENS FOR
RESPONSIBILITY AND ETHICS IN
WASHINGTON, and KNIGHT FIRST
AMENDMENT INSTITUTE AT COLUMBIA
UNIVERSITY,

Plaintiffs, : 17 Civ. 2542 (KPF)

v. : CIVIL JUDGMENT

U.S. DEPARTMENT OF HOMELAND
SECURITY and EXECUTIVE OFFICE OF
THE PRESIDENT,

Defendants. :

- X

KATHERINE POLK FAILLA, District Judge:

Plaintiffs initiated this action against Defendants after Plaintiffs Doyle unsuccessfully attempted to obtain, under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, records related to visitors of President Trump at the White House Complex, as well as at his properties at Trump Tower, in New York, and Mar-a-Lago, in Florida. On October 23, 2017, Defendants moved for summary judgment on Plaintiffs’ FOIA claims and to dismiss the remaining claims for failure to state a claim and lack of subject matter jurisdiction. (See Dkt. #45-51).

On July 26, 2018, the Court issued an Opinion granting in part and denying in part Defendants' motion for summary judgment, and granting Defendants' motion to dismiss. (See Dkt. #61). The Court directed

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DATE FILED: September 21, 2018

Defendants, within 60 days of the Opinion and Order, to disclose any material responsive to Plaintiffs' FOIA requests, and to provide a joint status update to the Court as to how they wish to proceed.

On September 21, 2018, the parties submitted a joint status update. (See Dkt. #62). The parties stated that the Defendants had disclosed the responsive material, and that no further issues remain for this Court's resolution. Accordingly, the parties requested that this Court enter a final judgment in this matter.

The Court hereby enters judgment. The Clerk of Court is directed to terminate all pending motions, adjourn all remaining dates, and close this case.

SO ORDERED.

Dated: September 21, 2018
New York, New York



KATHERINE POLK FAILLA
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

KATE DOYLE, NATIONAL SECURITY)	
ARCHIVE, CITIZENS FOR)	
RESPONSIBILITY AND ETHICS IN)	
WASHINGTON, AND KNIGHT FIRST)	
AMENDMENT INSTITUTE AT)	
COLUMBIA UNIVERSITY,)	
)
Plaintiffs,)	
)
v.)	Civil No. 17-2542 (KPF)
)
U.S. DEPARTMENT OF HOMELAND)	
SECURITY AND EXECUTIVE OFFICE)	
OF THE PRESIDENT,)	
)
Defendants.)	
)

PLAINTIFFS' NOTICE OF APPEAL

Notice is hereby given that all plaintiffs in this case appeal to the United States Court of Appeals for the Second Circuit from this Court's Order of September 21, 2018 (ECF No. 63), which entered judgment in this matter, and its Opinion of July 26, 2018 (ECF No. 61), granting in part and denying in part defendants' motion for summary judgment and granting defendants' motion to dismiss.

Dated: September 24, 2018

Respectfully submitted,

/s/ Anne L. Weismann
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